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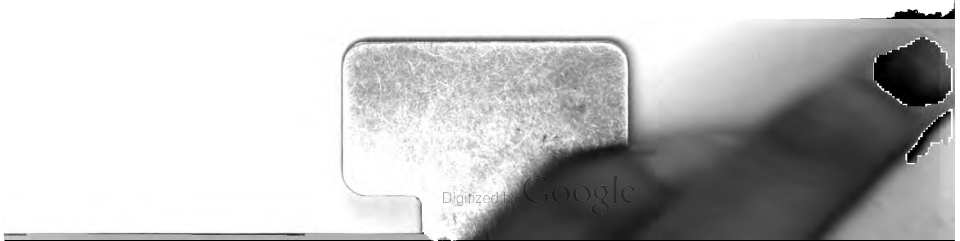

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THE

# LAW MAGAZINE;

OR,

## QUARTERLY REVIEW

OF

## JURISPRUDENCE,

FOR JUNE, 1828; OCTOBER, 1828; AND JANUARY, 1829.

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ERRATA.

Page 9 line 20 *for* "arises" *read* "arise."
55 .... 9 from the top *read* "in" *before* "a treatise."
58 .... 2 from the bottom, *for* "his" *read* "their."
95 .... 5 from the top, *omit* "into."
155 .... 9 from the bottom, *for* "freehold" *read* "freeholds."
157 ....12 from the bottom, *for* "mortgage" *read* "mortgagee."

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# THE LAW MAGAZINE.

## PRINCIPLES AND PRACTICE OF PLEADING.

*Speech of H. Brougham, Esq. M. P., on the Present State of the Law.* COLBURN. 1828.

*A Letter to the Right Hon. Robert Peel, on some of the Legal Reforms proposed by Mr. Brougham.* By C. E. DODD, Esq., Barrister at Law. Murray. 1828.

*Suggestions on Practice, Pleading, and Evidence.* By EDWARD LAWES, Serjeant at Law. 1827.

*The Supplement to the Encyclopedia Britannica; Article "Jurisprudence."* By JAMES MILL, Esq. Author of the History of British India.

*Westminster Review, No. VII. Art. 5. Law Abuses and Pleading; No. XI. Art. 3. On Practice and Pleading.*

IT is our intention to comment, hereafter, on all the topics introduced by Mr. Brougham, but the following remarks will be confined to the merits and demerits of pleading; and we regret to say, that, in executing our task, we must place ourselves in opposition to a prejudice now most extensively prevailing.

Beyond the pale of the profession, the present law of actions is universally condemned. The mode of calling the defendant into court, the forms of statement to which parties are restricted, the rules of evidence, and the method of enforcing the decree, are all subjected to reproach; but none,



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perhaps, to such unmitigated contempt, as the principles and practice of pleading. "This mischievous mess," says Mr. Mill, "which exists in defiance and mockery of reason, English lawyers inform us, is a strict, and pure, and beautiful exemplification of the rules of logic. This is a common language of theirs. It is a language which clearly demonstrates the state of their minds. All that they see in the system of pleading is the mode of performing it. What they know of logic is little more than the name."[1]

To such ribaldry as this, there is no manner of reply which well-bred persons can employ; but we will endeavour to wipe away some part of the reproach, by departing widely from that method of defence which is commonly adopted by the profession. We shall not seek to intrench ourselves in technicality; we shall not assume the necessity of any particular forms; but descend at once from the vantage ground of precedent and authority, and meet our adversaries on principles of abstract jurisprudence; and we undertake to shew, with as much brevity as possible, that, though overloaded by perverted ingenuity with much that taste and reason would reject, English pleading is founded upon principles as sound as any that reformers can contrive. We shall expose its faults as freely as we shall claim credit for its advantages. Yet we are convinced that the expence, delay, and uncertainty complained of, are attributable to the relaxation, and not to the strictness, of our rules; and that our best exertions should be directed to restore, instead of superseding or extending them. This, indeed, is Mr. Brougham's opinion, and the following observations will afford an illustration of his views. He, however, commenced at a point, to which we should not feel ourselves quite justified in proceeding. He gave our ancestors credit for sense, a commodity most commonly denied them; and took for granted the soundness of the foundations of the system, whilst numerous innovators are for demolishing the whole. We therefore shall begin the investigation at a somewhat earlier stage; for we have seen, as yet, no commentary on the writer from whom we just now quoted, nor on

[1] Supplement to the Encycl. Brit. Art. Jurisprudence.

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those who have followed in his train. All that we can venture to assume is the expediency of ascertaining beforehand the nature of the matter in dispute; and it is surely too obvious for denial, that, if parties were to proceed to trial without any warning but a summons to the court, without any species of preliminary arrangement, delay, uncertainty, and confusion would result. In such a case the plaintiff's range of proof would be unlimited; the defendant might be equally diffuse; unacquainted with the precise subject of contention, the judge could form no check upon their wanderings; and neither party could be prepared for explanation or reply.

We are agreed then as to the necessity of some sort of pleading, and shall hardly differ as to what are its proper objects; for that system is undeniably the best, which brings the parties most speedily to issue on a point material to their difference, which allows no statements but such as are absolutely necessary to the developement of the question, which conveys the fullest information with regard to the proofs required, and provides that these shall be as few as possible; and, above all, which accurately distinguishes the nature of the points in difference, and refers each to its peculiar jurisdiction; without which, the benefits of a decision must terminate with the suitor who procured it, as no precedent could be relied on as a guide, if fact and law were confounded in the judgment.

By what means these objects are attainable, and what progress towards them our practitioners have made, are the subjects for discussion here, and will perhaps be most easily explained by contrasting the present system with those already tried and those suggested for adoption; and, in the first place, we shall notice a peculiarity which distinguishes our course of proceeding from that of every other judicature.

With us, the allegations of parties are so restrained as to lead spontaneously, as it were, and without the interference of the court, to the production of an issue; whilst, in every other system, a comparative laxity of assertion is permitted, each party states his case at large, and, when all the circumstances of the dispute are fully developed, the pleadings are reviewed by the judge, who selects the material points and frames the the necessary issues. The rule chiefly instrumental in pro-



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ducing the effect we speak of is, technically expressed, the following; "That after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance;"[1] the meaning of which will be best explained, and the working best shewn, by an example.

If A. for instance, were to complain of B., he would set out in writing the grounds of his demand, to which B. would be called upon to reply in one of three ways:—by objecting to the sufficiency in point of law of the facts alleged, (i. e. by demurring); by denying the truth of the complaint, (i. e. pleading by way of traverse); or, admitting its sufficiency and truth, by stating facts, which prevent the circumstances relied upon by A. from having the effect attributed to them, (which is termed pleading by confession and avoidance.) If the first course, that of demurring or objecting to the legal sufficiency of the complaint, is chosen, the objecting party is taken to admit the facts, the dispute becomes altogether a question of law, and judgment is given for him in whose favour that question is decided, without requiring any evidence to circumstances. If, according to the second method of proceeding, B. denies or traverses the charge or any essential part of it, the parties are immediately at issue, and a time is fixed for determining the case by proof. But if, declining both of these methods, the defendant confesses the complaint and alleges a new line of circumstances in answer, as, that after the debt became due it was released to him by A.; then a change takes place in the position of the parties, and A. is called upon in turn to deny the truth or legal competency of the defence, or to allege other facts subversive of the effect of those set out by B.; as, in answer to the defence of a release, that such release was extorted by violence; upon which B. is called upon as before to demur, traverse, or state fresh matter; and thus the disputation proceeds, till either some essential circumstance is affirmed on one side and denied upon the other, or till the parties mutually admitting the assertions of each other, are at issue as to the legal effect of some one of the pleadings; a conjuncture which in most cases very speedily arrives, and cannot indeed be long protracted by the utmost

[1] Stephen on Pleading, 157.

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ingenuity of a disputant.[1] Details of circumstances must occasionally be prolix, as we can neither circumscribe their actual combinations, nor ascertain, beforehand and without a knowledge of the evidence, to what extent an allegation is diffuse; but it is quite impossible to wander from the point or to become illogical without immediate exposure, whilst the rule exemplified above prevails. This, however, it is unnecessary to press; as those whose censures we are most anxious to examine admit the merits of the mode we have described, but deny our courts the praise of following it. They mistake the exception for the rule; they know that a great deal of prolixity has crept in; that various anomalies are discernible; that legal forms appear preposterous to those who are ignorant of the history of our courts; and gladly availing themselves of the facilities for imposition afforded by the intricacies of the inquiry, and often possibly deceived themselves, a certain class of writers have thought proper to inform the public that a whole profession is in league against it, resolved on fostering a practice which has not the semblance of a principle to rest on, but is vague, confused, and contradictory throughout. Here, however, they shall speak for themselves, and we trust the reader will pardon the length of the extract in consideration of the weight of the authority.

"What is desirable in the operations of the first stage is, 1*st*, That the affirmations and negations with respect to the facts should be true; and 2*dly*, That the facts themselves should be such as really to have the quality ascribed to them. For the first of these purposes, all the securities, which the nature of the case admits of, should be taken, for the veracity of the parties. There is the same sort of reason that the parties should speak truly, as that the witnesses should speak truly. They should speak, therefore, under all the sanctions and penalties of a witness. They cannot, indeed, in many cases, swear to the existence or non-existence of the fact; which may not have been within their cognizance. But they can always swear to the state of their belief with respect to it. For the second of the above purposes, namely, that it may be known whether the facts affirmed and denied are such as to possess the quality ascribed to them, two things are necessary; the first is, that all in-

[1] A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another. This is fatal.

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vestitive and devestitive facts, and all acts by which rights are violated, should have been clearly predetermined by the legislature, in other words, that there should be a well-made code; the second is, that the affirmations and denials with respect to them should be made in the presence of somebody capable of telling exactly whether they have the quality ascribed to them or not. The judge is a person with this knowledge, and to him alone can the power of deciding on matters so essential to the result of the inquiry be entrusted.

To have this important part of the business done, then, in the best possible way, it is necessary that the parties should meet in the very first instance in the presence of the judge. A. is asked, upon his oath, to mention the fact which he believes confers upon him or has violated his right. If it is not a fact capable of having that effect, he is told so, and his claim is at an end. If it is a fact capable of having that effect, B. is asked whether he denies it; or whether he affirms another fact, either one of those, which, happening previously, would prevent it from having its imputed effect, or in a civil case one of those which, happening subsequently, would put an end to the right to which the previous fact gave commencement. If he affirmed only a fact which could have neither of these effects, the pretension of B. would be without foundation.

*Done in this manner, the clearness, the quickness, and the certainty of the whole proceeding are demonstrated.* Remarkable it is, that every one of the rules for doing it in the best possible manner, is departed from by the English law, and that, to the greatest possible extent. No security whatsoever is taken that the parties shall speak the truth; they are left with perfect impunity, aptly by Mr. Bentham denominated the *mendacity-licence*, to tell as many lies as they please. The legislature has never enumerated and defined the facts which give commencement, or put a period to or violate rights; the subject, therefore, remains in a state of confusion, obscurity, and uncertainty, And, lastly, the parties do not make their affirmations and negations before the judge, who would tell them whether the facts which they allege could or could not have the virtue ascribed to them; they make them in secret, and in writing, each along with his attorney, who has a motive to make them not in the way most conducive to the interests of his client, but in the way most conducive to his own interests and those of his confederates, from the bottom to the top of the profession. First, A., the plaintiff, writes what is called the declaration, an instrument for the most part full of irrelevant absurdity and lies; and this he deposits in an office, where the attorney of B., the defendant, obtains a copy of it, on paying a fee.

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Next B., the defendant, meets the declaration of A., by what is called a plea, the form of which is not less absurd than that of the declaration. The plea is written and put into the same office, out of which the attorney of the opposite party obtains a copy of it on similar terms. The plea may be of two sorts; either, 1*st*, a dilatory plea, as it is called; or, 2*dly*, a plea to the action. To this plea the plaintiff may make a *replication*, proceeding through the same process. To the replication the defendant may put in a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*. This, again, the defendant may oppose by a *rebutter*, and the plaintiff may answer him by a *sur-rebutter*.

All this takes place without being once seen or heard of by the judge; and no sooner has it come before him, than some flaw is perhaps discovered in it, whereupon he quashes the whole, and sends it to be performed again from the beginning."[1]

Now, in the first place, the reader will have the goodness to observe that demonstration, in this writer's vocabulary, has a very different signification from what it bears in ordinary discourse.

"Done in this manner," (i. e. with a code anticipating all possible combinations of facts, and a judge acquainted with each one of its provisions and fully competent to an extemporary application of them) "the clearness, the quickness, and the certainty of the whole proceeding are demonstrated!"

And what, we should be glad to know, what scheme or theory may not be proved the best, by assuming that every thing is attained which your opponent denies to be attainable? Fit my balloon, an aeronaut might say, with a machine to raise and lower it at pleasure and a rudder to direct its course, and the facility of travelling in the air is clearly and undeniably made out. Give me a place to stand on, said Archimedes, and I will move the world; but unluckily he could not find one, and the world continues as it was. Why, a code like that supposed and argued from is what even Bentham never dared to hope for! We have been told by him, that all the libraries of the Continent could not furnish a collection of cases equal in variety, in amplitude, in clearness, and instructiveness, to the English Reports. "Nor," adds he, "to the composition of a complete body of law, (in which, saving the

[1] Suppl. to the Enc. Brit. Art. Jurisprudence.

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requisite allowance to be made for human weakness, every imaginable case shall be provided for, and provided for in the best possible manner,) is any thing at present wanting but an arranging hand."[1]

Some lawyers undoubtedly there are with skill and knowledge sufficient to render almost all this store available. Ask one of these if there are precedents enough to decide even a majority of the cases submitted to him; if he is not often driven to equivocal analogies, and often to bare conjecture, or a wavering balance of possible constructions. Every practical lawyer must answer that he is; and yet it is unhesitatingly assumed that no dispute could ever be delayed by doubts as to the legal inference to be drawn from circumstances except by reason of the remissness of the legislature.

Here, however, we are wandering to a topic which may be hereafter the subject of an article, and which it is not necessary to decide on now. Though the system recommended by the Encyclopedist cannot produce the whole of the predicated result unless in co-operation with a perfect code, though under existing circumstances much time must frequently be wasted in settling legal doubts, it is not the less desirable to bring parties to an issue as cheaply and speedily as possible; and, if oral pleading would facilitate the process, it is certainly our duty to adopt it. But before we say one word of its advantages we shall take the liberty of reminding our readers that pleading in the presence of a judge was, in fact, the custom of those ancestors whose wisdom is a by-word for contempt; and that the practice was sedulously adhered to till long experience had made known its imperfections. The parties or their counsel came before the judge exactly as is suggested in the first paragraph of the extract, pursued precisely the same mode of *vivâ voce* disputation, with the same attention to those rules of logic which are deemed sufficient to make every thing precise, and which are still the foundation of our system. Should authorities be called for, there are enough of them below to establish the truth of the assertion;[2] and, therefore, we are under the necessity of supposing that Mr. Mill was ignorant of the history of our laws; or that he took from thence his beau

[1] Bentham on Codification.

[2] 3 Bl. Comm. 293. Reeve's Hist. Chap. 23. Stephen's Plead. 34.

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ideal of procedure, coolly assumed the merit of a discoverer, and then set himself to discountenance a system from which all his knowledge of practical pleading had been borrowed.

We are not contending that the method of coming to issue, which we have sketched and quoted above, is any thing more than an ordinary logical operation, familiar even in every-day discussion ;[1] but our proposition is, that no lawyers but the English have reduced it to practice ; and that those principles of reasoning, which our adversaries triumphantly contrast, form, in fact, the ground-work of our plan. Of course, as far as mere logic is concerned, it matters little whether A. details on oath or states on paper the fact which, he believes, confers upon him a right ; or whether B. replies *vivâ voce* to a *vivâ voce* complaint, or in writing to a written one. The legal effect of the statement may be, in either case, the first subject of inquiry ; and the same mode of denial may be used.

But when, say they, the statement is prepared in secret by the attorney or pleader, it is spun out for the augmentation of their fees, stuffed full of irrelevant absurdities and lies, and thence arises the nonsense and prolixity which now disgrace the administration of the law. Appoint a judge to be present at the process, and the evil is remedied at once.

Such is now the usual method of attack, and the practical lawyer will find no difficulty in discovering the mistake on which such arguments proceed. Because statements are prepared in private and not brought under the immediate consideration of the court until a difficulty is experienced or a flaw is found, it is most unfairly and illogically presumed that forms are all at the mercy of the pleader, to be contracted, lengthened, or mystified, at will. Mr. Mill evidently supposes, or at any rate intends his readers to suppose, that every pleading consists at present of all the seven stages for which the legal vocabulary has names ; of declaration, plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter. The truth, however, is, that at least one-half of modern pleadings consist merely of the complaint and a denial of about four lines ; that very few contain more than three or four stages ; and that there is not so much as a precedent of the

[1] See Stephen on Pl. note 29, where an exact description of the process is given from Quinctilian.

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seventh (the sur-rebutter) in Mr. Chitty's multifarious collection; and all who are familiar with the subject know that the seeming remissness of the courts, in leaving to a certain extent the system to itself, is, in fact, a proof of its efficiency; a proof that it has advanced far enough to dispense with the cost and trouble of a constant control. Every man who draws a pleading is aware that he must be as accurate in the arrangement of his matter as if in the presence of the judges; before whom, indeed, his composition would immediately be brought, if not legally and formally drawn up. And why should a judge be compelled to listen to all the common-place injuries of which suitors complain? A. states that B. has not paid him the price of goods sold, or has done some damage to his property. If any inaccuracy or legal doubt appears, let the writing be submitted to the court. But if the claim be merely one of every-day detail, the mode of describing which has been fixed incontrovertibly already, it may surely be made and answered as now, without any check but the private interest of the parties, who will be quick enough in appealing to the court when any rule or *formula* is departed from. Indeed, in all departments of public business similar expedients are resorted to for saving time and diminishing expence. It is dangerous, we know, to allude to the customs of parliament, which will meet with little respect from those whose opinions we oppose; but if the House of Commons were to discuss regularly each private bill it passes, the work would be never at an end, and the whole time of the legislature would be occupied in adjusting the rights of individuals. How then do they evade the inconvenience? Why, by taking for granted that, if the parties interested make no objection after receiving due notice of the intended enactment, the provision is necessary and just. A committee is nominated, but all its functions are frequently performed by a single member, who goes through the preliminary forms, and reports the conclusion to the house, which takes the whole that is told it upon trust; and a noble field for patriotic indignation such negligence assuredly affords. And yet the object is arrived at without imposition or trickery of any sort; for all concerned are informed of the proceeding, and watch it step by step, prepared to publish and vindicate their claims when

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the least attempt to infringe them shall be made. Now it is something like this with the proceedings in a cause. The formal statement, of such and such allegations having been made before our Lord the King at Westminster, is all confessedly a fiction. Neither in person nor by his judges does his Majesty control the disputation, which is carried on by an interchange of writings, prepared undoubtedly in private, but prepared with reference to principles and rules which circumscribe the discretion of the counsel as strictly as the court could do; nor does it seem to us illogical to suppose, that the former practice was gradually disused from a sense of the inconvenience of pursuing it.

"Perhaps," says Mr. Bell, "more injustice and oppression is committed by the undue protraction of litigation, in consequence of vague, wavering, unsettled, everchanging statements of fact in a system like the Scottish, than, upon the whole, by erroneous judgments; and nothing is more certain, than that a want of due care in the preliminary process, so as to bring out the true substantial question for judgment, is the great cause of protracted proceedings. It was on this account that the judges in early times were so watchful of the pleadings of the parties—and it was not in Scotland alone that the whole preliminary process, or statement of the pleas, proceeded in presence of the judge. It was so in England also, and their perfect system of pleading is the fruit of it.

"In England, the pleas which are now digested in the form of declaration, plea, replication, &c., were formerly delivered in open court orally by the party or his counsel; and the judge superintending this operation saw the several pleas entered upon the record. Indeed the pleadings, as they are now drawn in England, bear evidence that, originally, they were only the minutes of what was orally delivered, being framed as if they were extracts from the record.

"The Year Books still give evidence of the method in which this operation was performed, and no one can look into Plowden's Commentaries, without seeing how correctly the matter was argued, and how exactly the parties were kept by the judges to the logical exhaustion of the case. It is only in consequence of the long continued care with which judges

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superintended this operation, that the system of English pleading was gradually formed, which now works with unerring precision, without the necessity of such superintendance."[1]

But how stands the question of expence, and what greater tax is paid for law in consequence of the alteration? Here, at first, the question is against us. Nothing can appear more plausible to an unsophisticated or superficial reader, than the prospect of a brief adjustment arranged at one meeting by the court; no writings to pay for, no pleaders to employ, no demurrers to argue, nor formalities to fear. But fair and smooth and smiling as it is, a nearer view will dissipate the illusion. In the first place, tribunals must be multiplied to an extent exceeding what any theorist has allowed for. The cases which now come under the consideration of the court are those only in which the application of the law is doubtful, and those which are proceeded with till a judgment is obtained. The number of such is trifling, compared with the cases in which the legal liability is clear and the facts alone are questioned; and those which are settled without coming to trial. Yet in a system of oral pleading every one cause without exception, if carried farther than the service of the writ, would receive a share of the attention of the court, and an increase of judges would instantly be called for.

Certainly twelve able judges are more easily procured than fifty, and a difficulty is even at present experienced in filling the bench effectively. But we will suppose this difficulty surmounted, and fit tribunals established in every quarter of the country. On these the party must attend, and if his statement be straight forward and plain, he may call on his adversary to plead immediately; the question will be adjusted at a single meeting, and a day appointed for determining it by proof. But under such complicated systems as great and prosperous communities possess, there will frequently be claims which no prudent man could venture to assert without procuring professional advice. Skill and knowledge are still requisite to determine how far particular facts are investitive

[1] Examination of the objections stated against the bill for regulating the Scottish forms of process. By G. J. Bell, Esq. Professor of the Law of Scotland in the University of Edinburgh, p. 16.

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or devestitive of rights, even when all these are skilfully defined; numerous cases would occur, in which time would be necessary to consider the complaint and prepare the plea; and if the plea contained a fresh developement of circumstances, time would again be asked for to consider these; and thus, with each step of the proceeding, attendances and trouble would increase. We do not deny that in a majority of cases the parties could answer and rejoin immediately, if they would; but if either of them is anxious for delay, he has for it an unanswerable apology; for no tribunal can declare, beforehand, that a party who alleges himself to be taken by surprise is, in fact, attempting to impose upon the court, and quite competent to an extemporary explanation.

It is better, we shall be told, to attend the court, than attend a solicitor, and pay him for his writings besides. Most certainly, if you can do without writings altogether, and trust entirely to oral explanation. It strikes us, however, that it would be necessary for the judge to note down with accuracy the statements made before him; that each suitor would wish to have a transcript of what he had to answer or to prove; and that a formal record must be filed at the conclusion. Four copies would thus be required, and, if more are charged for now, there is surely no inseparable connection between the system and the abuse. It might have grown up just as well, though oral pleading had never been disused; and might be removed immediately without interfering with any thing but fees.

What then (and this is a chief object of attention), what is the use of the verbiage with which law proceedings abound? and would the presence of a judge prevent it? How happens it that so many absurd fictions are retained? Why, in one court, is it falsely said at the commencement, that the defendant is in the custody of the marshal? in another, that the plaintiff is indebted to the king? Why, in actions of assumpsit, are time and paper wasted in stating promises never made and never cared for in the proof? Why, in actions to recover property improperly detained, is it invariably averted, that the goods came to the possession of the party by finding, without regard to the real manner of acquiring them? and why are Doe and Roe eternally appearing, when-

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ever an expulsion is complained of, with a long story about a lease and an ouster, of which no one believes a syllable? This certainly is indefensible, when viewed with reference to abstract principles of jurisprudence, and we, at least, are not anxious to retain it. Place all the courts upon a par as Mr. B. proposes, and those fictions are immediately disposed of, which are used at present for the purpose of acquiring jurisdiction. Leave out the averment of promises, unless the claim is founded on them. Let the declaration in trover allege merely that the defendant has wrongfully appropriated the property of the plaintiff, and the declaration in ejectment, that the defendant keeps possession of his land. Re-model the forms in this manner, and full as much information will be conveyed as through the medium of the fictions we employ.

What this would save in money we shall by and by compute. That much would be gained in facility of comprehension, we deny; and as a sort of set-off to the anticipated benefit, we may mention the uncertainty that ensues when wonted modes of construction are departed from; and though, in the eye of refinement and philosophy, legal lore may be antiquated trash, the task of re-modelling regulations, applying principles, and anticipating contingencies, always was, and always will be, an undertaking of difficulty and time. But we do not press the objection; we are not to uphold error because its traces are not easily rubbed out; and if common counts are to be retained at all, they should instantly be cleared of their tautology.

In the next place, is it expedient to allow of declarations, merely stating, in case of money claims, that the defendant is indebted to the plaintiff for money received to his use, money lent to, or paid for, the defendant, &c. &c. without particularity of time or place, or, in short, any explanation of the nature of the transaction out of which the demand arises?

We own the question to be embarrassing enough; and we are aware that, by allowing the party to call for a more precise description in the shape of a particular, the insufficiency of such statements in affording information is tacitly allowed. Practically speaking, however, a defendant is never taken by surprise, unless by his own remissness; and the only doubt with us is, whether any evil would result from consolidating

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the particular with the declaration and requiring precision in the last; for since the party is restricted by the second paper he delivers, it would seem that he may just as well be restricted by the first. Yet, with really no wish whatever to play the advocate, we are unable to arrive at a satisfactory conclusion, that the advantages of both statements in co-operation might be had by adding them together. We know that the ancient strictness, which Mr. Brougham is anxious to bring back, was found very frequently oppressive; and we cannot help thinking that the present mode constitutes a middle point between the preciseness of the old system and the vagueness that would follow from a total relaxation of its rules.

The particular, it will be remembered, does not necessarily afford any information as to sums or quantities, which may be enlarged to any extent beyond the proof; time and place are left as uncertain as before; and it is considered sufficiently precise, however inaccurately expressed, so long as some intimation of the nature of the transaction is *bonâ fide* given; a rule too vague by far to form the foundation of a system.

Supposing, for the sake of argument, that you could infuse into the declaration itself just that additional degree of information which the supplementary statement conveys, you would still possess but a loose sort of *formula;* and it is quite impossible to improve it in precision, without proportionally embarrassing the complainant. We shall presently come to the consideration of the doctrine of variances, and find the same men, now contending for strictness, contending as zealously against it. Yet, how can particularity be enforced except by resolving that the proof shall tally with the statement, to entitle the suitor to recover? Time and place, for instance, can only be made material by requiring them to be proved as laid; and if, after insisting on circumstances, you allow of inaccuracy in detailing them, or permit the introduction of extraneous matter, it will be extremely difficult to assign limits to the indulgence. Yet laws, on the other hand, must make allowance for the occasional imprudence of mankind. Few of us, in the ordinary business of life, consider the transactions we engage in as likely to become the sub-

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jects of a law-suit, and note them down accordingly; minor circumstances are frequently mistaken; and justice will be as frequently defeated, if trifling discrepancies between the allegations and the evidence are held sufficient to defeat the claim. On the one side, is the evil of vagueness; on the other, the evil of severity. Make time, place and quantity material, and right is sacrificed to form. Permit a statement to stand good, with which the evidence has no closer connection than that of conveying the same general impression, and the opposing party is frequently in the dark, unless possessed of extraneous sources of information: ingenuity is exerted to mystify the explanation of the case by adding to one part, subtracting from another, and using a circumlocution for a third; false views are given, deceptive colourings put on, and facilities afforded for garbling the evidence and presenting proofs in unexpected shapes; though at the same time it might be difficult to say, that the party complaining of surprise was really ignorant of the transaction intended by the pleading.[1]

[1] The following is an amusing illustration of the mode in which statements may be generalised by the use of middle terms. It is extracted from a bill filed by one highwayman against another, and of course it was necessary to conceal the real nature of the transaction from the court.

John Everett against Joseph Williams. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c., that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expences on the roads, and at inns, taverns, or alehouses, or at markets or fairs. "And your orator and the said Joseph "Williams proceeded jointly in the said business with good success on Hounslow "Heath, where they dealt with a gentleman for a gold watch; and afterwards, the "said Joseph Williams told your orator that Finchley, in the county of Middlesex, "was a good and convenient place to deal in, and that commodities were very plen- "tiful at Finchley aforesaid, and it would be almost all clear gain to them: that they "went accordingly, and dealt with several gentlemen for divers watches, rings, swords, "canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month "afterwards, the said Joseph Williams informed your orator that there was a gentle- "man at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and "other things to dispose of, which, he believed, might be had for little or no money; "that they accordingly went and met with the said gentleman, and after some discourse "they dealt for the said horse, &c.; that your orator and the said Joseph Williams con- "tinued their joint dealings together until Michaelmas, and dealt together in several "places, to wit, Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex,

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Here, then, is the great problem for solution; and we know no better cure for idle and visionary expectations, than a brief reflection on the nature of these contrasted inconveniences and the results of the attempts to shun them. The ancient particularity was found objectionable, and common counts came in. A sweeping form of denial appeared well fitted to shorten the record, and general issues were almost universally applied. We have non-suits for variance to exclude the possibility of a surprise, and a multiplicity of counts to exclude the possibility of variance; special pleas to put the plaintiff on his guard, and double pleading for the protection of the defendant. To cover one, the other is unmasked; the dilemma is not to be evaded; and we, at least, do not hesitate to avow that we know of none but limited and partial remedies. Such, for instance, is the consolidation of the common counts; by using which the plaintiff entitles himself to give evidence of almost every species of money transaction out of which a debt can arise, without giving notice of the exact nature of the claim unless a particular is called for. Yet this vagueness of allegation must continue, however vicious its theory may seem, unless all actions of contract are assimilated, and special assumpsits adopted as the model; a measure which, at first view, seems rational enough. On this head Mr. Dodd satisfies himself by remarking, "That it is nothing to say, why require particularity in declarations of special assumpsit, and admit generality in actions of trover and money had and received. The answer is, the details are given in one action in the declaration, in the other by the particulars of demand; the end required is effectually ensured by different means." But why rest the point on an equivocal assertion, when a clear distinction may be drawn? When a suitor is required to specify the terms of an express agreement, he knows the limits of his task, and has a standard to refer to; but tell him to describe the circumstances which led to the receipt of his money by an-

" and elsewhere, to the amount of 2000l., and upwards." The rest of the bill is in the ordinary form for a partnership account. Our authority goes on to state that it was reported as scandalous and impertinent; that the solicitors were attached and fined, and that Jonathan Collins, Esq., who signed it, was compelled to pay the costs; that the plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735, and Wreathcock, one of the solicitors, convicted of robbing Dr. Lancaster in 1735, and transported.



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other, and all, comparatively, is arbitrary and vague. Take any one of Mr. Brougham's instances and attempt to act upon his hint, and the difficulty will instantly appear.[1]

In the second and third instances money is paid on a consideration that fails, or on a mistake. Are all the particulars, now left to evidence, to be set out in a preliminary narration? or how much, and what part of them? In the fourth example, is the illegal contract to be pleaded? In the fifth, the fraud upon the revenue? In the sixth, the title of the claimant? or, in the seventh, the relation of the parties, and the various considerations of which the question is composed?

Suppose, however, these particulars set out; we then become exposed to the penalties of variance; no slight evil certainly, but by no means so great as is commonly supposed. It is quite true that, in an action on an express agreement, the essential parts must be set out, and that unless the evidence substantially supports the statement the action fails, although a contract and an injury are proved. But it is an error to suppose that a technical variance is fatal. When the proof exceeds or falls below the description of the contract on the record, the sole question for consideration is, whether the excess, or the omission, restrains or in any respect qualifies the terms. The common-sense construction is sought out, and on that the judgment exclusively depends. All rules

[1] "Now, observe how various the matters are which may be all described by the foregoing words. In the first place, such is the declaration for money paid by one individual to another, for the use and benefit of the plaintiff; this is what alone the words of the count imply, but to express this they are rarely, indeed, made use of. 2dly, The self same terms are used on suing for money received on a consideration that fails, and used in the same way to describe all the endless variety of cases which can occur of such failure, as an estate sold with a bad title, and a deposit paid; a horse sold with a concealed unsoundness, and so forth. 3dly, The same words are used when it is wished to recover money paid under mistake of fact. 4thly, To recover money paid by one person to a stakeholder, in consideration of an illegal contract made with another person. 5thly, Money paid to revenue officers for releasing the goods illegally detained, of the person paying. 6thly, To try the right to any office, instead of bringing an assize. 7thly, To try the liability of the landlord for rates levied on his tenant. What information, then, does such a declaration give? It is impossible, on reading this count, to say which of the seven causes of action has arisen; and it is not merely those seven, for each one of them has a vast number of varieties, which are declared on in the same words."—Speech, p. 70.

[2] See Selwyn, N. P. 102. 116. 5th edit.

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must occasionally be harsh to suitors just within them: but if any thing like accuracy is desirable to guard against the chance of a surprise, what maxim more lenient can there be than that which we have just alluded to? And surely it is far better to limit the discretion of the judge by rules, the application of which may be in some measure anticipated and calculated on, than to vest in him, as Mr. Brougham proposes, an uncontrolled power of declaring at the trial whether statements are precise enough or not; a power which would be constantly appealed from, because each decision would be looked upon as an arbitrary fiat with no better basis than private opinion; and no man can be competent to declare how far concealment was the object of one party, or to what extent the other was imposed upon. There should be, moreover, an uniformity of practice in our courts; and what sort of resemblance would there be between the constructions of a judge with the habits of an advocate, and of one nurtured in the mysteries of pleading and convinced of the expediency of strictness? Can any man of observation doubt that Mr. J. Burrough would find material variances where C. J. Best would be unable to discover them?—that the one would ridicule objections which the other would immediately admit?

We would retain, therefore, the present particularity in actions on special contract, with the rules by which it is enforced; though with a full conviction of the evils that spring out of them, and the expensive precautions they require. We allude of course to the employment of several counts in the same declaration, in each of which the same case is described with some slight shades of difference, so as to meet any shape which the proofs may assume at the trial; a custom which has certainly been abused, most frequently from excess of caution, and now and then to add to the expence. The obvious origin of the practice is, the licence given to suitors to join several causes of the same nature, instead of bringing a separate action for each; and so long as this privilege continues, a complainant cannot be compelled to confine himself to a single statement of a single case, as the additional counts could in no case be struck out for similarity without the risk of infringing on the right. But, without reference to this peculiar difficulty, we would permit the same case to be differently



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stated for the avowed purpose of meeting varieties of proof. Some such mitigating expedient must be employed, or the rules of variance will be too severe; and surprise is effectually excluded, when all the shapes in which the charge can be proved are clearly presented to the view, and correspond in number with the counts. The expence indeed of such cumbersome machinery is an object of rational alarm; and there are no means of materially diminishing this, except the forbearance of the draftsman and the careful superintendence of the court. A party who employs useless repetitions is liable to the costs of the excess; but the court must exercise a more peremptory check than taxing the pocket of the suitor, who acts entirely by the directions of his professional advisers; and it is really preposterous to suppose, that, when special retainers are of frequent occurrence, and three or four counsel are commonly employed, litigants will voluntarily incur the slightest risk of failure to save a pound or two in pleading.

We have been speaking mostly of declarations in contract, but our remarks are generally applicable. What we have said of common counts on promises, may be said as well of the comprehensive forms in trover. Prune away the unnecessary words, and state simply that the defendant has in his possession certain property of the complainant which he has applied to his own use; and trust to the particular to exclude surprise. The conversion is here the main point; like the sale of the goods, the performance of the work, the receipt, payment or lending of the money, or the accounting, in the other cases in which precision is dispensed; and these are facts, to elucidate which particularity is highly desirable, but may be bought too dear. It is easy enough to say, that, in suing for the price of goods, their number, quality and value should be given; when there is not a man who calls for the improvement but would cry shame on the proceedings of our courts if they gave judgment against the vendor, because he claimed for twenty, and proved the sale of ten; because he dated the transaction in January, and his witness placed it in June; because he described the sale as taking place in Cheapside, though it actually occurred in Fleet Street; because he valued his property in pounds, and the proof was positive to guineas. Be then critical, but be consistent in your criticism.

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Enjoy your laugh at the pleader if you will, when, in suing for property, he inserts hundreds for tens; or, in declaring for a wrong by violence, exaggerates a smack in the face into "divers kicks, blows, and strokes on the head, face, eyes, nose, ears, arms, legs, breast, and back;" or the breaking down of a hedge into "breaking down divers gates, fences, and hedges, and trampling upon, consuming, and spoiling the grass and corn of the plaintiff," &c.; or, in an action to recover a cottage and an acre of land, claims "messuages, dwelling-houses, cottages, barns, outhouses, gardens, pasture, arable, meadow, and wood lands." This, we know, is miserable stuff, and may add some shillings to the costs; but you can form no rule to reach it that will not go too far: you cannot control the vagaries of invention, without pressing hard on unintentional mistake.

The Pleas are the next topics of discussion, and these are divided into pleas in abatement, and pleas in bar. The effect of the first is, merely to defeat the present proceedings; of the latter, that the plaintiff cannot maintain any action at any time in respect of the supposed ground. They succeed each other in the following order:[1]

1. To the jurisdiction of the court.
2. To the person of the plaintiff; as that he is legally incapacitated from commencing or continuing his suit.
3. To the person of the defendant; as that she is a married woman.
4. To the form of the writ; as misnomer of the plaintiff or defendant, or the misjoinder or omission of parties.
5. To the action of the writ; as that it was brought as for a wrong by force, when it ought to have been on a contract.

And, lastly, pleas in bar to the merits.

This order must be carefully attended to, as, by pleading any one, the defendant is precluded from resorting to those which rank before it. Thus, the second plea admits the jurisdiction of the court; the fourth admits the jurisdiction and the competency of the parties, and so on; but by taking each in regular succession the party may avail himself of all. We say, MAY avail himself, because the employment of all is

[1] We omit the plea to the count because no longer practicable.

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barely within the range of possibility, and not by any means discretionary in the defendant. The Westminster Reviewer, in allusion to these defences, is pleased to say,[1] "Being at length driven from all these outposts and obliged to answer the plaintiff's demand, he (the defendant) has still several other expedients in his power for delaying and harassing his opponent." But this gentleman forgot to prove that the grounds of objection thus pleadable are really immaterial or illogically arranged; he forgot to mention, that the objecting party must, in most cases, furnish the means of correcting the mistake, (for instance, a plea of misnomer must state the true name or names, and a plea of misjoinder the proper parties); that if the defendant pleads anything not apparent on the face of the proceedings, nor within the knowledge of the court, (i. e. any matter of fact) on which issue is joined, and found in favour of the plaintiff, final judgement is given for the latter; though, had the point been found against him, it would have concluded, not the merits, but the writ. And lastly, this gentleman thought proper to pass by, entirely, the enactment,[2] "That no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court, to induce them to believe, that the fact of such dilatory plea is true." How, therefore, all the outposts could successively be occupied, with such barriers placed around them, except by a concurrence of blunders almost miraculous, we really cannot see; and we are equally blind as to the "other expedients" improperly allowed. One is supposed, however, and we will take it up here, in order to clear the way for the more solid objections of Mr. Brougham, and because it is very easily disposed of.

The privilege of making objections merely formal, is looked upon as an instrument of oppression, of which the suitor should be instantly deprived; and the objection is made without so much as an allusion to the mode in which the practice is controlled. For any thing to the contrary stated by Mr. Mill, or by his admirer and disciple in the Westminster, one might suppose that no such things as amendments had ever been heard

[1] No. XI. p. 46. [2] 3 Ann. c. 16. s. 11.

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of; that a false step was irretrievable; and that pitfalls were insidiously contrived to entice the unwary to destruction. Yet on referring to the books of practice, it will be found, that many technical inaccuracies are cured by pleading over; that proceedings may be amended at any time before judgment, not merely after the objection has been made, but even after its validity has been discussed; and that, unless a party perseveres in error from downright obstinacy, or thinks proper to contest the point, no case can be decided upon a technical defect.[1] Thus, taking Mr. Stephen's example, triumphantly cited in the Review, suppose the time of committing a trespass to be omitted in the declaration. The defendant demurs, and points out (as he is obliged to do) the particular fault. Why does not the plaintiff amend? Because he has no merits. There can be no other reason, and it idle to talk of the injustice of a decision, which the supposed sufferer has forced upon the court. The question, in short, is simply this, whether all rules and formulæ shall be dispensed with, to save suitors the cost and trouble of correcting their blunders, when those blunders are clearly pointed out; and "that some forms," to borrow Mr. Serjeant Lawes' expressions, "must be put upon the record is quite evident, unless it be intended to turn the superior courts of law into courts of conscience and police offices. Well settled precedents always have been, and must ever be considered as the very touchstone of the law. Without some record of the facts charged and adjudged upon in civil as well as criminal cases, there can be no security for the consistent

[1] At any time before judgment, in ordinary cases, the proceedings may be amended by a judge at chambers, upon summons calling upon the opposite attorney to shew cause, why the party applying should not have leave to amend; in other cases the amendment may be obtained by application to the court. Also, the judge at *nisi prius*, upon application, may allow the record of *nisi prius* to be amended, and may order the clerk of *nisi prius* to amend it instanter, whether the judge who tries the cause be a judge of the court in which the record was made up or not, provided the defect be not in a material allegation, of which the party must have been apprized, and which he might have had amended before trial.

After demurrer, general or special, it is usual to give the other party leave to amend, and it has been given, even after demurrer argued, but before judgment, where the justice of the case required it. 2 Archbold's Practice, 262—279.

All technical mistakes and omissions are cured by verdict or judgment by default.

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administration of justice, either as it concerns life, liberty, or property."

So much for dilatory and technical defences. We now come to pleas upon the merits; and here the attempts made from time to time by the legislature and the judges to diminish the grievance of prolixity, have been productive of the worst results. We have stated already, that a majority of pleadings consist merely of the complaint and a brief denial of its truth; and this is the very evil we complain of. According to the strict principles of pleading, the defendant should make his choice between demurring, traversing, and confessing and avoiding, as explained at the commencement of these remarks. He should have it in his power to put the plaintiff to the proof of the complaint; but new facts and legal objections should stand alone, and be accurately explained. In many forms of action these principles are still attended to. In covenant, and in debt on instruments under seal, there is, properly speaking, no general issue. The most comprehensive form of denial that can be employed is, that the writing declared on is not the defendant's deed; under which, he can merely contest the fact, or the validity, of the execution of the deed. Any other defence must be particularly set out. In formedon, quare impedit, detinue, and replevin, the plaintiff has notice from the plea of the intended line of defence; and in trespass, to land, goods, or for personal violence, there is little reason to complain of its generality. In these actions, the general issue puts the plaintiff to the proof of the act alleged; and, as the case may be, that the lands or goods were his. If the violence was actually committed and the plaintiff legally possessed, and the justification is, a licence, right of common, or right of way, or that the act was done in aid of an officer, in pursuit of a felon, or to remove a nuisance, a special plea is necessary. Even here, however, there are occasional departures, owing chiefly to the intervention of the legislature. By express enactment, a distress for rent may be given in evidence under the general issue. Magistrates and most public functionaries are privileged in this respect, and may avail themselves of the general form of denial in actions brought against them for any thing done by virtue of their offices, and shew

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the special matter in evidence. A provision of the same nature now most commonly accompanies the grant of authority of any sort; and such cases are not improperly excepted, as an undue exercise of power is too notorious to take any one by surprise. But to prevent the possibility of perversion, it might be advisable to compel the officer or magistrate to give notice that he justifies as such, without setting out the precise nature of his authority.

No such partial remedy, however, will cure the vagueness of the usual plea in assumpsit and case, in which law and fact, denial and confession, are confounded. So glaring, indeed, is the aberration from principle, that we must look about to account for the departure, or we shall find it difficult to maintain that we ever had a plan. The truth is, the application of the action of assumpsit to cases in which no promise has been actually made, is a comparatively modern invention. The proper remedy in such cases was the action of debt, formerly objectionable on account of the precision required in the proof, and the privilege allowed to the defendant of clearing himself by wager of law. To evade its inconveniences, the courts resorted to the fiction of implying a promise when a demand was proved. Thus every circumstance affecting the liability becomes matter of consideration before it can be decided whether a promise has been made or not, and the general issue (non assumpsit) comprises necessarily every species of defence. To declarations on actual promises the general issue is not, in principle, so comprehensive; and grounds of discharge, occurring subsequently to the engagement, are not included in the terms of the denial. Yet led away by a supposed analogy, the courts have suffered express assumpsits and implied to be assimilated. With very few exceptions the defendant may now resort to every species of defence, without affording the least hint of his intentions; and (stranger still) he has the option of pleading specially, when he thinks proper to lengthen the record.

Now the use of pleading, as we formerly observed, is to throw off superfluous matter, to gain the advantage of mutual admissions and lessen the quantity of proof, to evolve the points of contention, and, by separating law and fact, to draw a broad line of demarcation between the provinces of the jury and the

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judge. Yet, in an action of general application, particularly to mercantile transactions (the most complicated perhaps of any), no warning is given, no disentanglement is made; but parties are left to guess the tactics of their adversaries, and grope their way to the encounter as they can. The judge at *nisi prius* is called upon to decide a legal doubt, and begs leave to postpone it for the court. A plaintiff is tricked by a defence which fair notice would have enabled him to expose, and a new trial is allowed of course. Instead of having a verdict to abide by, the parties come to town with their attorneys, and linger out the better portion of the term; and when they get back, witnesses are to be resummoned, preparations for the assizes made anew, and refreshers administered to the counsel. Delays and costs accumulate; yet because a final judgment is eventually obtained by a long, painful and hazardous procedure, we are gravely informed that, "though it should seem as if much confusion would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other."[1]

It is not, cannot be so. Here at least the great commentator has erred. Experience proves what prudence would anticipate; and there was in his time, and there is in ours, no wrong so grating to a litigant whose property is wasting in a suit, as to come close to a definitive decree, and be thrown back upon uncertainty again; to approach the conclusion of his pilgrimage, and find the commencement of a new one; to ask for quiet, and be fed with hope; to be dragged along from one tribunal to another, without a refuge from the tortures of anxiety except the stillness of despair.

*We* speak from experience, when we say, that the unwillingness of judges individually to decide points of law arising on the circuit, and the frequency of applications to the court for the reversal of such decisions as they venture on, are fruitful sources of procrastination and expense; and that these would most materially decrease if the strict rules of pleading were restored. We would rather adopt the maxim of singleness to its full extent; we would rather compel the defendant to take issue on a single point in the declaration, or to confess the

[1] 3 Bl. Com. 306.

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whole and confine himself to one mode of justification, than proceed any longer in the system we are following. Suppose a case similar to that mentioned in our article on mercantile law[1], and conceive what defences may be made. When stripped of its complicated machinery, the transaction, as is truly observed, is neither more nor less than a simple sale; but points of contention may arise, relating either to the quality, quantity, or management of the goods, the conduct of the broker, or the extent of his authority; a bankruptcy, an insolvency, a right of lien, the mode or fact of payment, &c. &c. A release, accord and satisfaction, or former recovery for the same cause, may also be relied on by the individual on whom the contract is sought to be enforced, with other grounds it would be tedious to particularize. Whatever they are, good pleading would elucidate them, whilst the general issue hangs a cloud upon the whole.

In permitting, therefore, the defendant to put the plaintiff to the proof of all the material averments in his declaration, we certainly go far enough; but when these are logically, they should be legally, admitted, and a plea in avoidance should necessarily confess. The general issue should be restricted to its proper sense, operate simply as a denial, and always stand alone; and defences resting on extraneous matter, on facts subversive of the effect, though consistent with the occurrence, of those relied upon by the plaintiff, should in all cases be specially set out. To the case of an implied assumpsit these suggestions apply but partially; as a simple denial involves the whole merits; yet even here we might do something, by requiring certain established modes of defence, (release, accord, payment, &c. &c.) to be specially pleaded. The number of answers to be allowed together is rather difficult to fix. Considering the uncertainty of proof, and how very frequently a case may fail on which the party had every reason to depend, we see no objection to admitting two special pleas to a complaint, without a reference to the court or a preventive check of any kind except the liability to costs; and we may repeat our former observation, that, though attention is distracted by variety, unfair surprises are prevented by an exposure of the utmost that can be proved. In no case, how-

[1] Page 52.

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ever, should leave be granted to resort to more than two defences,or to plead a special plea in addition to the general issue, except on actual motion and cause shewn. With regard to the replication too, there is no reason why some such rule should not prevail. If the defendants plead infancy, for example, the plaintiff may reply either, that the defendant was not an infant when the transaction took place, that the goods were necessaries suitable to his degree, or that he promised to pay for them since he came of age. There may be cases when it would be quite equitable to permit each of these points to be made, for the purpose of overthrowing a fraudulent defence; and therefore we would vest in the court the power of licensing a double or treble replication.

One more alteration, and we have done. Mr. Brougham suggests the expediency of allowing demurrers unaccompanied by an admission of facts; an amendment we would certainly adopt, since at present a suitor who is conscious of a material error in the pleading, lies by and takes his chance upon the proof, and then moves in arrest of judgment. When it is no longer necessary to admit the facts, legal objections will be taken at the outset; and the heaviest charge of all, the expence of trial, will frequently be saved.

Having now traced the outline of the system, and commented freely on its prominent defects, we would willingly conclude, were it not for the queries we proposed, and the pledge we gave, at the commencement. We have wandered over an interesting field, and pursued with care an intricate inquiry; noted much, and reflected upon more; but we have kept in mind throughout the points that are wanting to the argument. We know that we have yet to prove that oral pleading is open to prolixity, to formal flaws, and expensive disputations, and that imposing oaths on the litigants themselves would not exclude a multiplicity of allegations nor curtail the proceedings of a suit, without introducing a most iniquitous severity. On these particulars we shall be extremely brief; and, at the outset, we are quite willing to admit that there is one high authority apparently against us; that Lord Hale was of opinion, that the present practice had been productive of delay. But he, it must be borne in mind, was contrasting oral pleading conducted by counsel, with the ver-

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bose precedents and extreme strictness of his times. Our affair is with very different considerations, with the evils necessarily arising from the viva voce contentions of the parties themselves, and those of a system like our own, when made consistent with its principles. Mr. Mill will hardly support his views by appealing, with the Chief Justice, to our ancestors, for they depended upon lawyers to whom the good or evil of their law proceedings are attributable. He must rest his system upon common sense, on the every day experience of society; and here it is that we hasten to encounter him.

May we first, without impertinence, inquire of those who hope to simplify contention by bringing suitors into contact with each other and compelling each to turn pleader for himself, whether their attention was ever drawn to the mode in which men in general are wont to mingle in dispute, to the confusion and vagueness that prevail, to the strange wanderings and irrelevant remarks it is almost always the fashion to indulge in? Did they ever listen to a passionate complaint, or mark the glosses that are put upon a tale when the hero or heroine relates it? Did they ever take instructions for a brief, or act the part of arbitrator? If they have done this, or any part of it, they may well conceive the nature of details which mutual altercation would bring out. The judge might ask A. to mention the precise fact which he believes confers upon him, or has violated, his right, and A. would favour him with ten; or rake up the whole life of his adversary, with the rise and progress of their connection. Check him, and the court would place itself in a predicament in which our readers may now and then have found themselves, that of being extremely eager to sift a story to the bottom, and seeing clearly the impossibility of getting at it without falling in with the humour of the teller. If a man is to be limited in proof to the matter of his preliminary allegations, he will make the charge as sweeping as he can; and the answer will be equally diffuse, with equal claims to be so. The judge, however, must remember or note down the whole, arrange the topics, and fix their essentials; and, unless form and precedent are henceforth to be valueless, must give the statement a regular construction. In short, we impose upon the judge the proper

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task of pleaders and attorneys. Instead of presenting the kernel of the case, we tell him to extract it from the shell, and expect, forsooth, that he will mark intuitively the remotest bearings of every thing he hears. It is not at a single consultation that the material points of a case can be procured by a solicitor; for a legal liability is much more frequently to be deduced from a chain of circumstances, than found dependent on an insulated fact, and over-anxious clients will declaim, and colour and palliate for hours, even to their own agents. We cannot help thinking, therefore, that men in general would soon discover their own incompetency, and come over to Lord Mansfield's opinion, that he who is his own lawyer has a fool for his client. The failure of a few would teach wisdom to the many; and the result of this notable project would be the practice of reading in court mere formal statements professionally prepared, to be afterwards copied, and recorded as now.

With regard to the imposition of oaths, we have laid down already some principles for deciding on the point, though it is extremely difficult to meet suggestions so vaguely and generally thrown out. To what must the suitor swear? To a belief that all he says is true? or to a belief that the grounds on which he rests his case are all essential to support it?[1] In verifying dilatory pleas, an affidavit may be reasonably demanded; because, in each of these, a precise fact is relied upon, and no variety of allegation is required. But we have shewn the reasons of the law of variance, and the mode of mitigating its severity; and no recent writer has ventured to maintain that strict singleness in pleas should be enforced; so that, if an oath more binding is proposed than one to the effect that the party really expects to be aided by his allegations and does not make them for vexation or delay, if Mr. Mill wishes for a more severe restriction, we appeal to our former reasonings against it. If, on the other hand, he would rest satisfied with this; the answer is, its utter inutility. Multifarious statements have always an apology in the proverbial uncertainty of proof; convictions for perjury are out of the question; and we should

[1] At Athens each party swore to the justice of his case. Jones's Pref. to Isæus, 21.

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hope but little from the conscience of a party, who would coolly plan the protraction of a suit, and rest his hopes on the ruin of his adversary.

We have neither time nor space for more, not even to sum up our observations; but one broad distinction we deem it necessary to draw, as it may serve perhaps to elucidate our views. We think not so much of the direct as of the consequential evils of pleading; not so much of the money paid for writings, as of the expense occasioned by their want of accuracy and fullness. Should the improvements we have alluded to be made, we believe that fewer witnesses and proofs would be required; that new trials, special cases, and extraordinary applications to the courts, would very considerably decrease; but we can hold out no hope whatever of records much shorter than we have. The amendments alluded to by us, and suggested by the writers we have quoted from, are meant to amplify conciseness as well as to cut down tautology. In a declaration for the price of goods, for instance, we might save about two guineas by consolidating the counts; but this saving would be counterbalanced by an additional charge for pleas, when the general issue is more sparingly employed.

Pleading, however, with all its faults, is not the bugbear the public may suppose; and to assert that "all the expenses in a suit which are not incurred in summoning or taking the defendant into custody, in employing counsel, and collecting and adducing evidence at the trial, or enforcing the decision of the court, are produced by the present mode of pleading;"[1] is about as conclusive as to say, that all the expenses of building a house which are not incurred in laying the foundation, raising the walls, putting on the roof, and completing the interior, are incurred by the erection of the scaffolding. All systems of preparatory procedure must be attended by numerous inconveniences; but were they ten times worse, we must endure them, till fraud and error and obscurity are gone, till the wants of society contract, whilst all its relations are extending.

[1] Westminster Review, No. XI. p. 62.

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*A History of the Court of Chancery, with Practical Remarks, &c.* By JOSEPH PARKES, Solicitor, Birmingham. 1828.

*An Enquiry into the Present State of the Civil Law of England.* By J. MILLER, Esq. 1825.

*Copy of the Report made to his Majesty by the Commissioners appointed to enquire into the Practice of Chancery.* 1828.

ALTHOUGH the Court of Chancery has long been a fruitful theme for discussion, we are inclined to believe that the notions of by far the greater portion of disputants, with respect to the real nature of its abuses, are extremely vague. This confusion of ideas is mainly attributable to the manner in which public attention was first attracted to the subject. A court, in which Lord Eldon presided, was a tempting object for the attacks of opposition: charges were made with too much asperity, and repelled with too much confidence; and, both in and out of parliament, it became a matter of course for Whigs to assail and Tories to defend the Chancellor. The consequence was, a belief, on the one side, that the alleged evils did not exist, or were not susceptible of cure; on the other, a very general opinion, that to the judge were traceable all the delays of the court, and that to remove him, was to correct the vices of his tribunal. Literary discussion on the subject, long confined, with few exceptions, to the daily and periodical press, has at length assumed a more tangible character in various publications of high pretension, and, generally, of unquestioned talent. Among them must be particularized the able and candid "Enquiry into the present State of the Civil Law of England" by Mr. Miller, and Mr. Parkes' "History of the Court of Chancery." These, and the evidence appended to the report of the chancery commissioners, while they contain ample information on every branch of the inquiry, are too bulky to tempt the merely curious to a perusal. To lay before the general reader a concise view of the existing state of the court as represented in these publications, the most obvious causes of delay and consequent expense, and the most feasible plans that have been from time to time suggested for their removal, is the object of this article.

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The causes of delay may be divided into such as spring from the inadequacy of the court to transact the business brought before it, and such as arise from the defective mode of its procedure. The remedies also are of two kinds; the one being within the powers of the court itself, the other requiring legislative interference. The whole subject will be most clearly elucidated by a brief sketch of the constitution of the court, and of the principal rules by which the ordinary progress of a suit was guided prior to Easter term last.

There are in England two supreme courts of equity, the High Court of Chancery, and the Exchequer; in the latter, except tithe suits, little business of importance is transacted. The former is composed of three tribunals, respectively presided over by the Lord Chancellor, the Master of the Rolls, and the Vice Chancellor; before either of whom may be brought any case, except such as relate to lunatics, which must be heard by the Chancellor. The Vice Chancellor is compelled to hear all matters which the Chancellor may direct, in addition to those originally set down in his own court: the decrees, orders, and acts of the former are liable to be reversed, discharged, or altered by the latter. The sittings of the Master of the Rolls amount during the year to about one hundred and twenty, of four hours each; those of the other judges, to about two hundred, of six hours each; from which must be deducted, during the session of parliament, two and often three days in the week, on which the Chancellor presides at the hearing of appeals in the House of Lords. The Chancellor is also much occupied as speaker of the House — in giving his advice on the cases of condemned criminals reported to his Majesty by the recorder of London— in occasional attendances at the meetings of the privy council —in examining treaties, conventions, charters, letters patent, and the numerous instruments which pass the great seal, for the legality of which, and the accuracy of their contents, according to the warrants upon which they are founded, he is responsible—in much that relates to the administration of justice by others—and in such judicial and other business of his office as is transacted by him, but not in court. [1]

[1] Chancery Report.



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The subordinate officers of the court are, the masters, six clerks, registrars, and commissioners of bankrupts. The masters are twelve in number, including the master of the rolls, and accountant-general, or superintendant of the funds in court. The duties of these officers, (who formerly had a seat on the woolsack in the House of Lords, and are still employed there, chiefly in carrying messages to the Commons) are to enquire into alleged impertinence or scandal in any bill or answer, and into the sufficiency of any answer or examination—to take accounts of executors, trustees, and others—to enquire into and decide upon the claims of creditors, legatees, and next of kin—to appoint receivers of the proceeds of estates in litigation, fix their salaries, and examine their accounts—to sell estates—to appoint guardians, and allow proper sums for the maintenance of infants—to appoint committees of the persons and estates of lunatics—to decide upon the sufficiency of titles, and tax the costs of all proceedings in court[1]—they are always chosen from the bar. The six clerks are the only recognized attornies for conducting equitable suits, and by one of them every party in court must be represented. They file bills, answers, and other records; each of them is allowed twelve assistants, that is, ten sworn, (sworn not to pillage the records) and two waiting clerks; and by these, all the business of the court was transacted previous to the year 1729, when attornies in general were admitted, since which, their numbers have dwindled from seventy-two to eighteen. There are four registrars, two entering registrars, and eight clerks, from whom vacancies are supplied. The four registrars sit in turn before the three judges, and take notes of all orders and decrees, which are afterwards entered in the general register kept in the office; they also make and sign copies of decrees for parties who may require them.

Commissioners of bankrupts, seventy in number, are appointed by the Chancellor, and removable by him at pleasure. They are equally divided into fourteen lists, each list forming a court. To these all commissions against persons residing within forty miles of London are directed, and it is their part to examine into the affairs of bankrupts; seize their persons and property; receive proofs of debts, and appoint assignees.

[1] Chancery Report.

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All their proceedings are subject to the revision of the chancellor.

A suit in chancery is commenced by bill in the nature of a petition, praying relief, and a subpœna to compel the defendant to appear and answer. The bill having been filed, a writ of subpœna issues, commanding the defendant, under penalty of 100*l.*, to appear personally on a certain day, wherever the court shall be, "to answer those things which shall be then and there objected to him,"—on it is endorsed, "at the suit of A B." If the defendants are numerous, it is usual to insert three names in each subpœna; service being effected by leaving a label, and shewing the body of the subpœna to the two first, and leaving it with the last. To enforce obedience to this writ, five different processes may be necessary, each having an interval of fifteen days between its teste and return. After appearance six other processes of similar duration must be issued before the allegations in the bill can be taken as confessed by the defendant. Having appeared, the defendant may demur, plead, or answer, or all, or any of them. If he answers, the plaintiff is allowed two terms, with the vacations (about three quarters of a year) to file exceptions, that is, to object to the sufficiency of the answer. To these exceptions the defendant either submits, in which case he is allowed six weeks to put in a better answer, or he suffers them to be referred to the master, who hears the parties by their counsel, and reports his opinion upon the question to the court—from this decision an appeal lies to the court itself.[1] The second answer, which may also be excepted to, having been put in, the plaintiff is allowed to amend: for this no period is limited, and he may in fact do so at any time before the bill is open to dismissal for want of prosecution (which is analogous to a nonsuit at law), by a simple allegation that he is advised to amend. In some cases he may, even after replication, move for leave to withdraw his replication, and amend, though nearly six terms have elapsed since the answer. Amendments generally require a further answer, and a repetition of the proceedings above noticed. After the bill has been fully answered, although no step be

[1] A defendant may put in four insufficient answers; after which he is interrogated as to particular points, and committed until he has answered perfectly.



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taken by the plaintiff, the defendant is not entitled to call for a dismissal of the bill until the expiration of a period of three quarters of a year; the plaintiff may then, by filing a replication, gain a further delay of equal duration; after which, he undertakes to "speed his cause," and at the expiration of another term, to "speed his cause with effect," and not until then is he compelled to proceed, or lose the benefit of the suit. The cause being at issue, witnesses are examined, upon interrogatories prepared by counsel, the answers to which are delivered orally, and immediately reduced to writing. The depositions are afterwards made public, and copies given out to the parties interested. The cause having been heard, the court pronounces judgment, from minutes of which, taken at the time, and the senior counsel's brief, the registrar draws up the decree, prefacing it by an abstract of such parts of the pleadings as have reference to the directions of the court. Thus stood the practice previous to the late publication by the Chancellor of certain orders, founded on the propositions of the chancery commissioners. A particular discussion of each of these orders, seventy-seven in number, being incompatible with the limits of the present article, we shall briefly notice a few of the principal.

The second of them directs a subpœna to appear to be sued out against each defendant, and removes an inconvenience frequently experienced; as where one of the two first defendants could not be served before the return of the subpœna, it became necessary to sue out a second.

By the fourth, a plaintiff shall in all cases be allowed two months to deliver exceptions to the defendant's answer; but if they be not delivered within that time, the answer shall be deemed sufficient.

The eighth directs the master, upon finding an answer insufficient, to fix the time to be allowed for putting in a further answer.

The tenth revives a dormant order of 1700, by which, after a third insufficient answer, every defendant shall answer upon interrogatories to the points reported insufficient.

The thirteenth and fourteenth limit the plaintiff, in general, before replication; to one order to amend; such order to be obtained within six weeks after the answer is to be deemed

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sufficient, and to contain an undertaking to amend within three weeks after the date of the order.

The fifteenth prevents a plaintiff, after replication, from withdrawing it, and amending, without a special order, obtained upon affidavit that the matter of the proposed amendment is material, and could not have been sooner introduced into the bill.

The sixteenth and seventeenth compel a plaintiff to bring his cause to issue in about one fourth of the time before allowed.

By the forty-ninth, each master is directed to enter in a book to be kept for that purpose, the name or title of every cause or matter referred to him; the date of every step taken therein; and the attendance or non-attendance of the several parties on each of such steps.

The object of the nine following, is to obtain punctuality in these attendances, and to enable the master to proceed *ex parte* where he shall think fit.

By the fifty-ninth, every warrant for attendance before the master is to be considered as peremptory, and he shall be at liberty to continue the attendance during such time as he thinks proper. The two first warrants have hitherto been considered as mere waste paper, and each attendance was limited to an hour.

The sixty-ninth empowers the master, at his discretion, to examine witnesses *vivâ voce.*

The seventy-seventh directs, that whenever, in any proceedings before the master, the same solicitor is employed for two or more parties, such master may, at his discretion, require that any of the parties shall be represented by a distinct solicitor.

The Chancellor has expressed his intention to make other alterations, for which, as affecting the fees of certain officers, he conceives the sanction of the legislature to be necessary. He will not, we trust, profit so little by the materials ready to his hand, contained in the evidence attached to the report of the commissioners, as to stop upon the threshold of improvement; he has yet done little; but that little, while it affords the best proof of his desire to assist zealously in correcting the vices of his court, contains a severe censure upon his predecessor. That Lord Lyndhurst will ever equal

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Lord Eldon as an equity lawyer is not to be expected; but he may, by a cautious exercise of his influence, achieve the prouder distinction of having purified the springs of justice, and modelled our institutions to the increased intelligence and multiplied requisitions of society. But, alterations of far greater import are imperatively demanded. The number of petitions in lunacy, set down for hearing in 1801, was 147; in 1823, 364; in bankruptcy, in 1801, 247; in 1823, 498. "In January 1825, the arrears of business in the three courts stood thus: 695 causes, 473 petitions, 238 causes upon exceptions and further directions, 43 pleas and demurrers, and 126 appeals, making together 1577 separate subjects for consideration; the final settlement of which, would be sufficient to occupy the time of the three judges for at least three years to come, though no fresh business were brought before them,"* From these facts, and the evidence given before the commissioners by Messrs. Heald, Bell, Roupell, Bickersteth, and the Vice Chancellor, the last of whom stated that three angels could not do the business, it is clear that three judges are insufficient to dispose of the matters brought before them, with such dispatch as the public has a right to expect. The existence of a great inconvenience being established, it remains to be enquired how it can best be remedied. The obvious methods are either to increase the number of judges, or to narrow the jurisdiction of the court—a partial adoption of each may be expected. With respect to the latter, the suggestions of the committee on the appellate jurisdiction of the House of Lords, noticed by Mr. Parkes, are peculiarly valuable. They are, that the statutory jurisdiction created by local and private acts, relating to canals, bridges, inclosures, docks, and roads, and to the supply of towns with water and gas, which direct the purchase money of lands and other property taken under authority of the same, in case of doubtful or protracted titles, to be paid into chancery; also the administration of acts creating benefit and friendly societies, with whose disputes the court is much occupied, should be entrusted to the court of exchequer. The same remark applies to two propositions of the chancery commissioners, relative to the granting of writs of Habeas Corpus,

[1] Miller, 463.

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and commissions to examine witnesses abroad. By several acts of parliament, the Chancellor has concurrent authority with the courts of law, to award writs of Habeas Corpus, and the practice is, although all the judges may be in town, to make applications of this nature to him. It is proposed, in order to prevent the interruption of regular business, caused by discussions on the return of these writs, that the Chancellor be empowered to grant them and make them returnable before any judge, who shall proceed thereon as if they had been granted by himself. As to the other proposition; in an action at law the court cannot award a commission to examine witnesses, without the consent of the non-applying party, and if that is withheld, the other party is driven into a court of equity to obtain relief. It is recommended to invest judges at law with authority to award such commission on the request of either plaintiff or defendant, without the consent of his adversary, and that it be no longer granted by a court of equity, where the bill praying it has no other object.

But it is upon bankruptcy that the great attack must be made. That so monstrous a system should have been invented is sufficiently extraordinary—that it should have so long outlived the discovery of its unsoundness, can only be accounted for by the union of judicial and political authority, so perniciously centered in the Chancellor. Such extensive and irresponsible patronage is too valuable an appendage of that officer to be lightly surrendered; but all considerations must yield to the existing spirit of enquiry, and this tribunal, important and faulty as it is, will probably be among the first to feel its influence. The truth of the maxim, that the perfection of a tribunal is to dispense the maximum of justice with the minimum of delay and expense, is not admitted in this court. The judges of it receive 23,000*l.* a year, and the whole expense is estimated by Mr. Montagu at 240,000*l.*; each meeting of two hours costing 12*l.*, or about two shillings a minute. The practice, and sometimes the law, varies in all the lists, and the gentleman just alluded to, in one morning obtained two directly opposite decisions. These statements by no means reflect upon the commissioners, whose general zeal is testified by the facts, that in three years there were held in London 15,000 public, and 6,132 private meet-

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ings; and that of 253 petitions for hearing in chancery, in the month of July 1826, only 27 were appeals from commissioners. To an erroneous impression on this point is attributable a proposition of the chancery commissioners, for the selection of ten of the present commissioners of bankrupts as a court of appeal, to whom all matters, now the subject of appeal to the Chancellor, should be first submitted—the original, and not the appellate jurisdiction is the real burthen on the court. The creation of a single judge, ranking with the other inferior judges, is the most popular alteration that can be effected; by him this branch of law would be administered with regularity and despatch, and at one fourth of its present cost. The objection sometimes thrown out, that such a judge would not find sufficient employment, if well founded, might be obviated by transferring to him the statutory jurisdiction before mentioned. But the plan is not the less consonant with sound policy, for including the experiment of apportioning the duties of the judge to the physical strength of the man.

Thus much for the judges of the court—its officers demand particular notice. The masters appear generally to have dedevoted themselves to their duties with great zeal, and a disregard of personal convenience, that in some measure atoned for their defective mode of procedure. The recent orders investing them with power to compel the regular attendance of solicitors before them, cannot fail to be beneficial, and if followed by others, establishing a uniformity of practice in all the offices, will remove the chief objections to the present system. But others are requisite. The taxation of costs should be transferred from the masters to the clerks in court, (if the existence of the latter is to continue,) they, in their capacity of assistants to the master, being really the taxing officers. The taking of accounts is another important duty of the master, for which he is peculiarly unfit. Ability to unravel mercantile accounts, intricate and artificial as is their structure, cannot be expected in a mere lawyer; and a sufficient number of accountants would be an invaluable appendage to the office. Mr. Parkes gives a curious instance of Lord Northington's sentiments upon this point. Being pressed to refer a complicated account to the master, he

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drew out his watch, and said, "Observe this curious piece of mechanism; if it was out of order, I would as soon send it to a blacksmith to be set right, as refer an account like this to a master — I refer it to two merchants." The method of remunerating the masters is injurious to themselves and the public. To themselves, as exciting suspicions of their purity — to the public, as entailing unnecessary expense on suitors in chancery. The rule of the office is, that copies of all papers left by one solicitor, must be taken by each of the others attending on the business to which such papers refer. This rule, upon a rigid observance of which a master's emoluments mainly depend, by an equitable construction is made to include another; namely, that some one must pay for a copy of every document left, whether wanted or not. Thus, in a suit for specific performance of a contract of purchase, an abstract was left by the plaintiff with the master, to whom it was referred to enquire whether a good title could be made. The defendant, knowing there was no objection to the title, did not appear before the master, but the abstract having found its way into the office, it became necessary that some body should pay for a copy: this the plaintiff was compelled to do; but having no sort of occasion for it, he merely took away a slip of paper, endorsed "Copy abstract of title," for which he paid 8*l.* This is by no means an uncommon occurrence, these slips of paper being known by the cant term of "dead copies."

With respect to clerks in court, the chancery commissioners observe; "If we were engaged in framing a new system, it might become a matter of grave consideration, whether it would be useful to establish officers, distinct from the solicitors, for the performance of all those duties which are now performed by the clerks in court. We are satisfied, from the evidence before us, that no material delay, and a very trifling expence, arise from the intervention of clerks in court, and we believe that the existence of these officers does tend to secure a degree of regularity and uniformity of practice which, considering the great extent and variety of the business of the court of chancery, could not be obtained without them." By what process the commissioners arrived at this result, we shall not stop to enquire — our own conclusion

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from the same premises is diametrically opposite; and in support of it we refer to the evidence of Mr. Vizard, a solicitor of eminence, who states, that a step in a cause is frequently delayed a fortnight, and in one case, that an expense of 65*l.* out of a bill of 81*l.* was incurred, by the intervention of these officers. Each of them in rotation is occupied two months in the year, independent of certain meetings of the whole body, at least once or twice a week during term, for the decision of important questions, the precise nature of which Mr. Vesey when interrogated by the chancery commissioners could not recollect. On these extraordinary occasions they assemble at four, despatch their business, and dine at five: they sometimes, however, "talk of business" over their wine. Mr. Vesey acknowledges their number to be, unnecessarily large, but pleads in bar of any reduction, *the great antiquity of the number six.* The propriety of doing away with this class of officers, is often insisted upon; but, as they are useful for keeping the records of the court, the transfer to them of the taxation of costs appears preferable to their abolition—but under any circumstances solicitors should at least have the option of conducting suits without their interference.

The number of registrars, being the same as before the office of Vice Chancellor was instituted, is found too small, and the chancery commissioners recommend the appointment of two additional ones, the whole to be selected from barristers of ten years' standing. The last part of the proposition appears objectionable. A clerk seldom becomes a registrar in less than twenty-five years, during which period he must acquire a more familiar acquaintance with this branch of practice than is to be looked for in a barrister. The registrars, like the masters, derive their profits chiefly from money paid for copies, which are taken to induce them to expedition in preparing decrees. The length of decrees so much complained of, is caused by the inability of the registrars to discharge their increasing duties; for, driven to copy rather than abstract, these decrees necessarily contain much that is irrelevant.

There are some other points which could not have been conveniently mentioned earlier, but which we must not pass over without a brief notice.

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By the act creating the office of Vice Chancellor, he is prevented from discharging or varying any order made by the Lord Chancellor, or Master of the Rolls; this extends to "orders of course;" that is, orders granted on being asked for, and drawn up and passed without being mentioned to the court. The reason of the rule, that the Vice Chancellor should not discharge or vary any order upon which another judge has exercised his judgment, fails when applied to "orders of course." It is, therefore, proposed by the chancery commissioners, with a view to correct this inconvenience, and to give more weight and efficacy to the office of Vice Chancellor, that so much of the statute as limits his power to the hearing and determining of such causes, matters, and things only as the Lord Chancellor shall direct, be repealed; and that henceforth the same independent jurisdiction be exercised by the Vice Chancellor as is now exercised by the Master of the Rolls. The extensive right of appeal, particularly in interlocutory matters, now prevailing, ought to be restricted: there is no good reason for allowing an appeal from the Vice Chancellor or Master of the Rolls, to the Chancellor, and again from him to the House of Lords.

Some limitation to the number of counsel to be employed, is desirable—two on each side appear to be sufficient. A proposition to this effect made by the chancery commissioners, if acted upon, will be much felt by young barristers; but any loss from this cause will probably be repaired by another proposition, to allow no barrister to make more than two motions at each time of being called on. The present practice permits every barrister to go through all the motions with which he is intrusted, and of course checks the distribution of business among the juniors.

That alterations of the nature we have alluded to will, ere long, be made, there appears no reason for doubting; but, whatever may be done, the foundation ought, in our opinion, to be in the separation of the office of Chancellor from that of Prolocutor of the House of Lords. While inferior judges hold their places *quamdiu benè se gesserint*, the highest officer in the realm owes his existence to the stability of a political faction: a squabble in the cabinet—a misunderstanding between two right honourable secretaries—in short, any "untoward event"

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may suddenly sink him into comparative insignificance and penury. Hence he is more anxious for the preservation of his office, than for the honest discharge of its duties; and not unfrequently passes those hours which should be devoted to the judgment seat, in posting between London and Windsor. Hence too, a frequent change of judges, with its attendant evils, delay and expense to the suitor. To these necessary consequences, must be added another that may, and generally does, spring from the same pregnant source, namely, the existence of inefficient judges. "As aptitude for office," observes Mr. Parkes, "should form some consideration in promotions, it is also time that the political opinions and actions of a barrister should cease to be his chief title to the judicial office." Until they do cease so to be, a judge must necessarily be in a great measure at the mercy of counsel, "and as long as the bar is more able than the bench (as of late it hath been), the business of the court can never be well dispatched."[1]

There is always at the bar some individual particularly calculated to succeed to the bench; and as, according to Mr. Brougham, in his late celebrated speech, Westminster Hall would unanimously select the most proper successor to Lord Tenterden; so also, we venture to assert, that no unbiassed practiser at the chancery bar would hesitate to name the individual best qualified by unprecedented extent of business, and extraordinary legal knowledge, acuteness, and energy, to discharge most efficiently the duties of Chancellor. Were decisions in chancery guided by the rules of natural equity, that is, by the vague and arbitrary dictates of individual caprice, there might be some reason for placing a common-law barrister on the bench; but, so long as the decisions of the court are founded on precedent—so long as equity forms a distinct and difficult branch of jurisprudence, such appointments must be highly reprehensible. Much stress has been laid upon what is styled the absurdity of a strict adherence to precedent in a court of equity; but "they know little that perceive not the difficulty of ordering matters in justice interlocutorily upon the strength of abstract reasoning only, without help of stated

[1] Proposals tendered to parliament in 1653. Parkes, 158.

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rules and methods prefixed by practice and experience;"[1] and, without advocating a servile dependence on previous decisions, we feel assured that there could not be a more powerful cause of evil, than the indiscriminate relaxation of general rules to meet the hardship of particular cases.

We have endeavoured to redeem our pledge, by giving a plain account of the present state of the Court of Chancery. That it can longer exist thus is impossible; but it behoves those to whom the pruning-knife may be committed to be sparing in its use.

"The general rules of law," observes Mr. Sugden, in his letter to Mr. Humphreys, "are as perfect as human intelligence can make them, although there are anomalies which should be corrected, and many forms which should be abolished; we are more enlightened, and fear not to do that directly, which our ancestors could only accomplish indirectly: and, therefore, we are all agreed that the substance should be retained, and that we arrive at it by a cheap and direct road, instead of an expensive and crooked way."

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## MERCANTILE LAW.—No. I.

MUNICIPAL jurisprudence may be classified under two general heads; that which is purely conventional, and that which is founded on generally received principles of natural equity. Now it is evident, we think, that this latter division possesses more intrinsic interest than the other. An exquisitely artificial system, like that which regulates the course of real property in this country, has indeed charms for the antiquarian and the lawyer; but to the general reader it necessarily presents an aspect not only unattractive, but, we fear, absolutely forbidding. We would not be understood, however, to disparage the study of this part of our law, or to deny that

[1] North's Examen. Parkes, 210.

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occasionally it takes strong hold upon the imagination. It may be, and no doubt is, amusing enough to a man of curious and speculative turn to trace the machinery from its original structure, simple but compact, rude yet effective, down to the ingenious and elaborate apparatus, which has at length become too complicated for the management of any but the most scientific practitioner. Nor is the investigation without this further interest, that the successive additions and modifications, which the system has undergone in its progress, illustrate and are illustrated by the manners, customs, state of knowledge, and history in general, of the different periods through which it is deduced. To a mind, therefore, constituted like that of Butler, such a study is remarkably congenial, and may be supposed to convey a proportionate enjoyment. But there are not many, who have either the taste to relish such enquiries, or the industry to prosecute them with effect.

Again, we can readily conceive that it must be an intellectual exercise of a very pleasing kind, and one exactly resembling that of the geometrician or algebraist, to obtain from a few general axioms, first the leading propositions, and from these again, by regular deduction, the whole body of subordinate rules with their corollaries, which make up the law of real property; to work out the intricate problems which the occasions of a state of society like ours continually give rise to; and to apply the general *formulæ* to cases and circumstances to which, at first sight, they seem but ill-adapted. It is precisely this sort of gratification, which we can suppose to have been enjoyed in an eminent degree by the subtle and ingenious Fearne. But this also, as well as the other, evidently presupposes a peculiar aptitude, either natural or acquired. In all probability the great majority even of those, who may honor us by becoming readers, are neither antiquarians, nor black-letter lawyers, nor mathematicians; are not absolutely enamoured of Lord Coke; nor would quite forget to dine, in their eagerness to settle the almost invisible boundary, which separates a conditional limitation from a contingent remainder. We may, therefore, safely revert to our original position, that the study of that branch of law, which is arbitrary in its principles,

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and artificial in its structure, has no great claim to general interest.

But the case is very different with that which has its foundation in reason and equity. There is no man with a well-ordered mind, by whom the distinctions of right and wrong, even with all their niceties of shade and gradation, can be contemplated with indifference. There is no man, to whom the practical application of admitted principles in the distribution of justice, or rather in the correction of injustice, can fail to be directly interesting. Here every decision may be referred to a standard recognized and adopted by all. Every man has in himself a test of its soundness. It is no longer authority, but reason; it is no longer mere law; it is truth, and nature, and morality. The further, therefore, we recede from regulations merely technical, the nearer we approach to the fountain head of natural justice, the more generally interesting does the inquiry become. Some mixture of positive rules there must and will be in every part of the system; but if there be any which is peculiarly exempt from artificial subtleties, and more directly referrible to equitable principles than another, it is unquestionably that which relates to commercial transactions.

Indeed, this branch of our law may be considered rather as the accessary than the principal. It merely comes in aid of what is already established. It rarely originates anything; but simply enforces the obligations of conscience, and sanctions the regulations which, in the practice and course of trade, have been found beneficial. In its details it refers to usage, and in its precepts to common honesty. It is consequently neither abstruse in the matter, nor technical in the form. Its language is not made up of

> "Phrase which time has thrown away,
> Uncouth words in disarray,
> Trick'd in antique ruff and bonnet."

It is the dialect in common use—the ordinary speech of men of business. It requires therefore no previous study to understand it, no painful effort to bring the mind to bear upon it.

In an age and a country like this, it is needless to insist upon

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the importance of a competent acquaintance with mercantile law. What is it which has caused, in late years, so immense an addition to the judicial business of this country? What are the great majority of cases in the decision of which our courts of law are almost incessantly occupied? Are not three-fourths of them mercantile questions? Let any one consider, for a moment, the vast and complicated scheme of our foreign and domestic trade,—let him reflect upon the multitude of hands through which the several commodities pass,—on the thousand modes which are in operation, for advancing the separate interests of all concerned,—on the amazing stimulus which luxury has given to competition, and the countless schemes and speculations thence resulting;—let him endeavour to reckon up the various classes of men who derive, not subsistence only, but opulence, from trade—the hosts of manufacturers, merchants, brokers, factors, ship-owners, wharfingers, carriers, bankers, money-jobbers, and insurers—and lastly, let him contemplate the confusion introduced among all these by a bankruptcy, and he will readily conceive that the maintaining a just equilibrium, in all the parts of such a system as this, may well engross a large share of the labours both of the legislature and the bench.

Yet though so multifarious in its details, and so extensive in its application, the mercantile code of this country is by no means intricate or confused. On the contrary, it is remarkably simple and harmonious. Indeed it is a system of sudden and comparatively modern growth, having been begun, matured, and perfected within the limits of the last half century. It has therefore passed through few hands, and is the work of a succession of judges as vigorous in understanding, and of as enlightened and comprehensive views, as any that have adorned the bench,—of Mansfield, Kenyon, Ellenborough, and Tenterden. But though from this circumstance it has derived a more than ordinary unity and consistence, it has nevertheless the disadvantage, in consequence, of remaining still in a great measure an undigested heap of particulars. It is not many ages since England became decidedly a trading country. In the old text-books of the law, therefore, little is to be found on the subject of mercantile dealings. It is evidently considered a matter of minor importance; and whilst

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unwearied labour is bestowed in digesting, illustrating, and commenting upon every part of the law which concerns the realty, whatever relates to the mere personalty, that unsubstantial ever-changing property, which was almost beneath the regard of the lordly proprietor of lands and manors, is either altogether passed over or dismissed with an occasional notice. Unfortunately, in modern times, the labour manifested in the compilations of Comyn, Viner and Bacon, has not been fashionable, and hence it has happened, that there is not a single treatise in which this part of our law has been reduced into one general code. Particular sections have, it is true, been handled with great ability, and some by persons now deservedly at the summit of the profession. The work of the learned Chief Justice of the King's Bench on Shipping, that of Mr. Justice Park on Insurance, and that of Mr. Justice Bayley on Bills of Exchange, are all excellent in their kind. Again there is a short Treatise on the Law of Principal and Agent by Mr. Paley, and a few others which will readily occur to the memory of the reader, well deserving the attention of the student. Still, in all these treatises there is this disadvantage, that each being the work of a separate individual, and considered only with reference to its own peculiar class of cases, there wants that unity of design, that co-relation between the different parts making up the whole, without which we conceive there can be no perfect understanding either of this or any other system. To judge of a system, as of a building, to ascertain its bearings and proportions, it must be viewed altogether, and with one sweep of the eye. The parts of which it consists, being all referrible to common principles, and directed to a common end, necessarily illustrate each other.

Granting, however, to these works all the merit to which they are entitled, still so long a time has elapsed since their appearance, that great and important changes have taken place. The very principles on which many of the decisions were founded have been shaken—the commercial policy of ages has been overturned, and positions of law, deemed incontrovertible, may be, and indeed have been, drawn into question. Again, innumerable cases have since come under the cognizance of the courts, doubtful points have been settled, and



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many distinctions and qualifications of general rules have been admitted to meet particular exigencies. It is evident, therefore, that some correction, and more addition will be needed. But, besides all this, there are several important heads of mercantile law which have never yet been the subject of any methodical treatise; and there is a multitude of cases relating to them which are only to be found scattered through volumes of reports, or at best, collected under general titles, without order, method, or connection. Now this may be a matter of little consequence to those in whom long practice supplies the place of study or research; but it is a formidable obstacle to the progress of the novitiate. There are not many capable of either generalizing or distinguishing correctly. At all events, the study becomes a work of much greater time and difficulty, than it would be if a clear and comprehensive notion were first obtained of the principles which over-ride and govern the whole. And, after all the pains which the most persevering industry can bestow, the mere case-lawyer will be liable to continual error from trusting to fancied and incorrect analogies. In short, no sound lawyer ever was or ever will be made by the mere study of particulars. The only way to know accurately, is to make sure of the principle—the only way to judge truly, is to consider the matter in question with reference to that principle, and then, by way of guidance, help, or confirmation, to ascertain whether the same or a like point has before arisen, and in what way it has been determined.

To supply, as far as in our power, these several imperfections; to connect the disjointed parts of the system, and embody all which belongs to it; to fill up what is defective, correct what is erroneous, and fix what is floating, is the object we have now in view; and in order to this, we propose to give in successive numbers of this magazine a series of plain, concise, and popular treatises, on the mercantile law of England. In the prosecution of this design it is our intention first to shape out a general outline of the whole system of foreign and domestic trade, commencing with the simplest contract of sale, and tracing, in somewhat historical order, its gradual progression to the vast and complex operations of modern commerce. Having given this

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view of the whole, in order to the better understanding of the parts, we shall then retrace the sketch, and endeavour to fill it up with greater accuracy of detail. Nor are we without a hope, that in the way proposed, the student may be led by a gradual and easy ascent to a vantage-ground, from whence the entire plan may be seen, as it were, mapped out before him. It will then be found, that the several districts into which it is parcelled out, however distinct in their boundaries, all partake of the same general properties, and are governed by the same general rules. The only difficulty then remaining will be the assigning of the particular case to its own specific class; a difficulty which will be infinitely lessened by the commanding view thus obtained. It has been urged before, and it cannot be too often repeated, that no art, no science, no system of any kind ever was or ever can be thoroughly learnt by the mere investigation of the separate parts. Who ever became, we will not say a good physician, but even a good oculist, by attending solely to the eye? Who can understand the working of a compound machine, if he confine his view to a single wheel? It is by observing the relation of the parts to each other, and to the whole, that truth is to be obtained.

Each case also must be carefully analysed, so as to elicit the principle. The same principles which regulate the simplest and most direct bargain between two individuals, will then be found to apply equally to the most intricate commercial dealing. The mind, however, is frequently puzzled by the introduction of a number of circumstances, altogether immaterial to the real question in issue; nor is there any habit more valuable, in order to correct and ready judgment, than that of separating immediately what is essential from what is merely accidental, and then confining the view solely and exclusively to the former. Thus, in a question as to the precise interpretation of the terms of a contract of sale, what matters it, for this purpose, whether the real buyer and seller dealt directly with each other, or by the intervention of a broker—whether both resided in England, or one abroad—or whether the goods were to be handed over immediately, or to be delivered through the agency of a carrier? Our notion in this respect will be



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illustrated by the work itself. For the present, therefore, a single example will suffice. A mercantile house in England writes to one of the parties abroad, commissioning him to purchase and ship off a certain quantity of foreign produce to be consigned to them. He employs his broker to effect the sale, who makes a bargain, as broker, with the owner of the goods, and stipulates for the delivery of them at a particular place, on a specified day, to be thence shipped off to England. The seller gives the broker three months' credit for the price of the goods; and he draws a bill of exchange on his principal for the amount. This is accepted by him, and discounted at his bankers' abroad. The bankers again draw upon the firm in England, and they accept the bills upon the faith of the goods consigned. Now this, stripped of the machinery, is neither more nor less than a simple sale between A. and B. of goods to be delivered on a day fixed, and paid for in three months' time. It is evident, however, that out of a transaction so complicated a great variety of questions may arise. Thus, the goods may neither be of the quality, nor the quantity contracted for — they may have been damaged in the carriage either by land or water — they may have been altogether lost — the broker may have deviated from his authority in making the purchase — he may have become bankrupt before the three months were expired — the firm in England also may be insolvent, either before the goods are shipped — and they may consequently be stopped *in transitu* — or after their arrival the wharfinger may detain them for his general balance. These and many other cases may occur, and the first consideration, therefore, ought always to be, on what particular part of the transaction does the matter in dispute depend? If it be on the legal construction of the contract of sale, then every thing may be dismissed, except what relates to the mere bargain, as between A. and B. If it arise out of the relation of principal and broker, or of the partner abroad to the firm at home, then let it be viewed solely with reference to those several relations; the other particulars being taken into account only so far as they are necessary to the elucidation of that which is the real question.

All this may seem, and certainly is, very obvious; yet however true and simple in theory, there is scarcely any rule less

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regarded in practice. It is the great fault of modern reports, that they set out indiscriminately all the facts of the case, without considering or caring whether they have any immediate bearing upon the point to be decided. This may be very useful for swelling the bulk of a volume, and enhancing its price; but it is attended with a serious inconvenience to the reader. He is obliged to wade through the whole, because he is ignorant what and how much of it is material — and thus the memory is fatigued, the attention dissipated, and the mind distracted by a variety of minute circumstances, which have no more to do with the matter really in dispute than the adventures of Tom Thumb, or Jack the giant-killer. This error we shall at least endeavour to avoid in the present work. Indeed, to give a lengthened detail of particular facts, is manifestly inconsistent with its design. Where so much is to be comprehended, the limits assigned to each portion must necessarily be very narrow, and we shall therefore merely lay down general propositions, and illustrate them severally and in order, by a brief statement of the most important cases, which properly belong to them. We are at the same time far from supposing that it will be possible to proceed strictly in an arrangement so purely philosophical, as that each case shall be assigned exactly to the class under which it falls. Such a method, however excellent in theory, would be found exceedingly inconvenient, if not altogether impracticable. An exception to one rule is an example of another, and it may be proper to consider it sometimes as the one, and sometimes as the other. But with this and such other qualifications as are absolutely necessary, the rule of philosophical classification will be carefully observed. If, for instance, the case be one of partnership, it will be ranged under the head of partnership, even though the subject-matter should happen to be a bill of exchange, or a charter-party of affreightment. Under the title of bill of exchange, the properties and incidents of a bill, as such, will be considered, and they only, and so with the rest. The advantages of such a method are so obvious, that on this head we shall say no more, but shall conclude these prefatory observations by reminding our readers, that if a faithful exposition of the law and principles of trade be at all times useful in a country depending in a great measure for its subsistence

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on trade, it must be so in a more especial manner at a period like the present. A revolution has lately taken place both in the maxims and practice of commerce. True principles have gained ground, and a better policy is both understood and acted upon; a spirit of free, unfettered enterprise has gone abroad, and speculations are embarked in of a magnitude unknown to former times. The legislature also has recently interfered by many important enactments in the regulation of mercantile dealings, and the disposition of the property of defaulters,—and, lastly, the code of international law has in these days been settled on a solid basis by a judge, whose enlightened decisions are recognized as authority by all the civilized nations of the world. Under these circumstances, we may perhaps be pardoned for hoping that the subject proposed will be found neither unimportant nor uninteresting.

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## ON CONVEYANCING.

### No. I.—*Critical Remarks on some popular Writers.*

GREAT complaints have frequently been made of the repulsive aspect of our system of real property. Its general excellence, and substantial adaptation to the exigencies, and even capricious wishes of a commercial and wealthy people, are acknowledged by all who are capable of appreciating it; but its greatest admirer will also readily admit, that its stupendous bulk and bewildering complexities are well calculated to frighten away the student, or (if he must go forward) to disgust him with his profession.

Either of these consequences is, of course, to be lamented, and with the view of obviating them, elementary essays have, within a comparatively recent period, appeared on this branch of law, in great abundance. Their effect has been extremely salutary; and perhaps we may say, that if the law of real property is more regular in its form, and systematic in its doctrines than any other department of English jurisprudence, its superiority is chiefly ascribable to the meritorious efforts of those who, with the advantage of habitual acquaintance with this subject, have employed themselves in developing

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its principles, and arranging its scattered topics. We shall, in the following paper, which we intend to be the commencement of a series, take a brief and rapid survey of the principal writers on the law of real property who have appeared within the last fifty years, and who are commonly taken as clues to its dark and thorny labyrinths.

Mr. Fearne, who must be placed at the head of this valuable class, symmetrized the rude and complex mass of learning on contingent and executory interests, a treatise which is interesting, not merely to the practitioner, but to the theorist, as an intellectual exercise.[1]

Mr. Sugden has with great ability thrown together the doctrines of the courts relative to the law of powers, and of vendors and purchasers; and if he falls far below his extraordinary predecessor in logical acumen and talent for classification, he has certainly excelled him in soundness of legal judgment and in accuracy of detail. In this respect, indeed, he cannot be praised too much. You may generally depend on the author's industry of research and fidelity of citation. He explores the fountain head of his subject; and in these laborious and useful scrutinies he has in many instances succeeded in verifying original reports. At the same time he has, we think, his faults. He appears to be not unfrequently lost in detail; and to suspend his judgment, and even waive the exercise of his reason, on the topic before him, at the appearance of contradictory authorities, which a clear perception of the principle would have enabled him to dispose of satisfactorily.

Mr. Preston, has long been treading the same path; and perhaps to the practising lawyer his numerous publications have proved as useful in some points, as those we have alluded to. They generally evince a profound and very familiar acquaintance with the law of real property in all its branches; and as a series of isolated propositions, deduced, and for the most part with skill and accuracy, from unquestioned authorities, they form a valuable repertorium; but here our praise must stop. There is not one of them which does not show an incapacity for lucid arrangement, and betray a quaint and singular style in which the sense feebly glimmers through a cloud of words;[2]

[1] Of Mr. Fearne's merits we have spoken more at length, in our biographical sketch of him, page 115.

We shall give a curious specimen of Mr. Preston's early style. "In this

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we are bored with truisms in the midst of dissertations on the highest branches of the system; and, what is worse, fatigued, and indeed disgusted, with eternal repetitions. In his latter works, he has been less remarkable for his first fault; but he has made up for its absence by trebling the two last. His Essay on Abstracts, which is now in three volumes, might (we venture to affirm) be contained in one of the same size; with a little compression of the diction, and an omission of repetitions. We are almost inclined to think that the same remarks might be applied to the Treatise on Conveyancing; a work, in some particulars, deserving great commendation. The third volume, which is confined to the law of merger, though by no means free from the author's characteristic defects, has much fewer of them and is by far his most able and original production. The last edition of the Treatise on Estates, which is still in progress, demands the student's attention when he is pretty well advanced in his professional pursuits. But we cannot recommend this gentleman's editions of some standard works. Instead of increasing, he has absolutely destroyed their peculiar utility. There is scarcely a proposition in the Touchstone, which is not crippled, entangled, or obscured; the original text is broken up into unintelligible bits, that the *Editor* may new-lay and commix it with his own additions. It would not be enough to say that the sense of the author is turned out of its simple course, into a winding channel. The stream is perfectly dammed up. Or rather like some well-known rivers it suddenly sinks and disappears, and we see it not again till we have crossed the sterile tracts which cover it.

Mr. Preston's corrections of the text do not stop with improving its legal accuracy. Does his author purposely omit a

kingdom it is not allowed to any man to have two wives; or to any woman to have two husbands; therefore when a man is a husband to a woman, or a woman is a wife to a man, neither the relation or the rights of a husband shall, in the one case, be annexed to the person of the man, as to any other woman than his wife; nor, in the other case, shall the relation or the rights of a wife be annexed to the person of the woman, as to any other man than her husband: *of consequence* the man shall not intitle himself to be tenant by the courtesy of the lands and tenements of any other woman than his wife; for as he *can* be a husband to one woman only, he shall not intitle himself, with respect to any other woman than his wife, to those privileges and benefits which are proper only to the husband of the individual woman concerning whose property the question arises."—*Essay on Estates, p.* 473, 1*st Edit.* This is but a small portion of this truly original dissertation.

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word which is necessarily understood, and would in the same place, and for the same reason, have been omitted by any body else? It is carefully inclosed in a bracket, and you are expressly told to read it. Even his author's grammar falls within the scope of his emendations. Does he meet the expression '*a use*?' He troubles himself to alter the indefinite article '*a*' into '*an*,' with (to shew that this grammatical accuracy is all his own) the '*n*' in brackets, thus *a*[*n*].[1]

He has treated in the same way Mr. Watkins's Principles of Conveyancing, but as we think lightly of that performance, we were far less indignant at the editor's equally presumptuous and absurd plan of ramming (we must call it so) his own ideas into those of his author. We regret that candour compels us to so severe a censure; we estimate Mr. Preston's abilities, as a conveyancer, as highly as any one; and we trust that if he favours the profession again, as we understand he means to do, with other treatises, he will endeavour, more than in his previous writings, to raise his character as an author nearer to a level with his deservedly high reputation as a practical lawyer.[2]

After the writers we have mentioned, we would class Mr. Butler; and if the quantity and character of his legal productions were proportionate to their usefulness, we should place him above the others. There are few to whom we are more indebted. He is the first who blended practical with theoretical knowledge, and nothing can be happier than his clear and simple manner of explaining an abstruse doctrine. Hence, though his notes to the First Institute have rarely more connection with the text they are appended to, than with any other on the same subject, yet some of them, as insulated essays, are extremely valuable. Those on uses and trusts were, at the time they appeared, the best exposition of those doctrines; and there are several minor ones, all excellent in their way. Still there is nothing in these annotations from

[1] With all deference to Mr. Preston's philological knowledge, we beg to say, that here he and not his author has erred. The '*u*' is long in '*use*', and though the *h* is wanting, the word is aspirated. This is one of the instances in which orthography and orthoepy happily coincide.

[2] We have seen many of this gentleman's opinions, which (we speak it as a remarkable fact) have been extremely perspicuous and precise.

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which a remarkable acquaintance with his subject, or a talent for combination and arrangement, or a power of pursuing principles into their remote and hidden consequences, can be inferred; and therefore neither as a writer, nor a lawyer, do they warrant us in giving Mr. Butler the highest rank. And his efforts to illustrate the First Institute appear to more peculiar disadvantage from their neighbourhood to those of his singular predecessor, who, as a lawyer, far surpassed all his contemporaries in depth of research and variety of acquirement, and who grappled always ably, and often successfully, with all the difficulties which distressed the text.[1]

The law of uses and trusts has been simplified and elucidated by Mr. Sanders; and considering how largely that doctrine enters into the whole system of real property, we evidently ascribe a great achievement to that gentleman, when we say that he was the first who wrote an able treatise on the subject. His work has been considerably improved in its successive editions, and is distinguished by a tolerably clear arrangement, a neat and perspicuous style, and in general by compression. He appears to us, however, to have great faults, which are scarcely balanced by the merits we have allowed him. His work is, in many parts of it, any thing but elementary. He constantly advances positions which he never thinks of supporting by any reason, or of referring to any principle; an elliptical and oracular form, which is tolerable only in writers of profound knowledge and vast powers of reasoning, who have duly weighed the inference, and carefully inspected the intermediate ideas which link it with the premises. We fear that with the majority (and among them we must place Mr. Sanders), the only pledge they can give us of having maturely reflected on their propositions, is a display of the grounds of them; we may then know what is drawn from principle, what is fixed only on authority; we may then ascertain to what point of a scale, which may be graduated from enactments and adjudications, through all the varied shades of probable deduction, down to hypothesis itself, his positions are referrible. It would not be difficult to substantiate our charge of frequent

[1] Of Mr. Butler's edition of Fearne, we have spoken in our biographical sketch of that gentleman.

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inconsiderateness in Mr. Sanders; and some of his errors are so palpable, that we are sure he could not have committed them, had he deemed it proper to accompany his proposition with its reason.[1] He is likewise sometimes woefully defective in his logic. But we can at present dwell no longer on his merits or demerits; whatever the latter may be, his treatise does and must continue to form a part of our libraries. It has a most unquestioned claim to the student's attention; and we hope that our endeavour to shew wherein it is really meritorious, will enable him not only to appreciate it more duly, but to profit by it more largely.

Mr. Cruise is an author of humbler pretension, but we know, in modern times, few that, on the whole, have performed a more essential service to this part of our law. We would not, however, recommend his *Digest* (with which he embodied his specific essays) as the best work to which, on every topic, the student can apply. Its merits are unequal; and it rarely succeeds in what we have above hinted at as the peculiar merit of Fearne's Essay, which it proposes as a model; viz. in calling the reasoning faculty into operation. Its object is to give the cases which formed the ground-work of a rule, in a brief and simple way, and thereby enable us to compare the author's conclusions with his premises. But whenever he is left to his own unassisted efforts, he soon quits this laborious and useful method, and the work changes into a simple pile of abridged cases and quotations from other books. The most meritorious parts of the Digest are, we think, those on which the author had antecedently bestowed exclusive pains; the chapter on uses, that on dignities, and the volume of fines and recoveries. There are others wherein he has, to a culpable extent, availed himself of the labours of others, as, for example, the chapters on remainders in the second, and those on executory devises, in the last volume, which are little better than a transcript of Fearne's Essay, with in general a blind adoption of that gentleman's errors. The only difference is, that he has stated the cases rather more fully. Upon the whole, therefore, we do not agree with many gentlemen who superintend the studies of the conveyancing student, that the

[1] *Ex uno disce.*—Vested remainders *in fee* (in fee, in italics) are grantable, (2 Uses, 29.) Who ever heard it doubted that *any* vested remainder might be granted?

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Digest is the best work for grounding his attainments; with the exceptions adverted to, we advise him to use it only as a book of reference; as which, though much inferior to Comyn, and to the abridgements,[1] it ranks high, and must take precedence of any modern competitor.

Of Mr. Watkins, the author of what he has been pleased to style the Principles of Conveyancing, we must now speak; but rather out of deference to others, than because we think him entitled to be classed with those we have enlarged upon. He is, in our judgment, flippant and superficial. His work is not only crude, but little as it is, abounds with inaccuracies, the less pardonable as the author stirs not an inch from well-known ground. If he comes to what he deems a doubtful point, he dispatches it by a syllogism which always begs the question. Mr. Sanders, in replying to one of these academic puerilities, gravely tells him, on the authority of Bacon, that *syllogismus constringit assensum non animum;* but the fallacy of the one he was addressing himself to,[2] was far too palpable to constrain even a momentary assent.

The pompous proemium to Mr. Watkins's most successful work,[3] the Principles, in which he evinces the most exalted opinion of himself, and the most sublime contempt for Lord Coke, must excite a smile in all who compare what he has done with what he professes to do. We will give an instance. Speaking of Coke, "Points," says he, "of the greatest nicety, and learning the most abstruse, are suddenly presented to the view of a novice, which would perhaps puzzle the most experienced lawyer. Deductions and conclusions are given when the principles from whence they flowed remain unexplained," &c. Now mark how methodical is Mr. Watkins himself: how closely he adheres to his own rules of composition. He begins his chapter on possibilities thus: "A possibility cannot be on a possibility.—It is devisable," &c. Should he not, according to those rules, have first told the student what a possibility is?

[1] Viner, Rolle, and Bacon.

[2] Relative to the doctrine of copyholds, and contained in Mr. Watkins's treatise on that subject.

[3] We mean as far as popularity goes. His best work (and that has really merit) is the Treatise on Copyholds.

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Time would fail us were we to attempt an inquiry into the characters of all the publications of merit that have appeared within the last few years on real property; but we should be guilty of great injustice to two very able writers, did we pass over Mr. Coote's Treatise on the Law of Mortgage, and Mr. Roberts's Treatise on Devises. Both of them are rival works to two on the same subjects by Mr. Powell; and though there are material points of difference between them in general structure and design, they nevertheless admit of comparison; and we do not hesitate to prefer those of Mr. Coote and Mr. Roberts.

These are the principal works of an elementary character with which the conveyancing student has to commence his labours; and we think few will deny that a space still remains vacant between these large and necessarily complex treatises and the bare theoretic outline which has been sketched by the master hand of Blackstone.[1] At present the transition is abruptly made to one of these from the second volume of the Commentaries. Yet most of them, we will venture to say, he will not only fail to appreciate, if merely thus prepared, but will probably turn from with despair or disgust. His scientific pursuits, if he has any, will strengthen the feeling. He has been used, perhaps, to the straight and certain paths of mathematical demonstration; to assume nothing, and to retrace, at pleasure, the long chain of beautiful dependencies which terminates in intuitive truth. He will find that he is obliged to take for granted a vast variety of *proposita* which the author has presumed his readers previously familiar with, and what is still more painful, to fix them in his memory as points of doctrine, which, however arbitrary, capricious, or revolting, are essential to a knowledge of the system he has resolved to master. Hence he soon begins to fancy that memory alone can facilitate his progress; he accordingly endeavours (and most frequently in vain) to load it with particulars; and though that faculty may support the grievous burthen, he is sure of failing in his great object, to become a really able lawyer, unless gifted with the

[1] His commentaries (says Sir William Jones in his Law of Bailments) are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately soever it may be delineated, will make a geographer.

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rare endowment of detecting and unfolding the latent principle.

We shall proceed to make a few remarks on the fitness of the student's taking up the First Institute in that stage of his studies to which we are alluding. If this work is perused under a judicious superintendant, we know none more useful; if taken as what some have styled it, the lawyer's bible,[1] and to be greedily and indiscriminately devoured, none more probably pernicious. We are persuaded, that in former days, when hard reading was thought, far more than now, to be essential to professional success, many a hapless tyro has thrown aside this awful volume, and his vocation likewise, from a conviction that he had encountered an insurmountable obstacle at his very outset. The truth is, that much in Littleton and Coke has now become dead matter, and may, consequently, be skipped with equal profit and pleasure. We speak of course with reference to those only who wish to accomplish themselves as lawyers, and to "attain the point proposed" by the shortest and easiest road: we by no means intend to throw disrepute on antiquarian research of any kind; but it is undoubtedly desirable that a student should know the real nature of his inquiries, and not imagine that he is advancing as a modern conveyancer, when in truth he is only qualifying as a juridical antiquary. Hence, when his wish is legal information, at present useful in conveyancing practice, we advise a selection of, and exclusive application to, those parts of the First Institute which bear on the modern doctrine of estates. There is something in the *ipsissima verba* of Littleton and Coke, which induces us to prefer them to any others on the same subject. The treatise of the former of these illustrious lawyers, leaves all similar works at an immeasurable distance, in point of lucid arrangement, and in simplicity and perspicuity of style. His divisions are always strictly logical; his classifications unexceptionable. Not a word, nay not a syllable, is used in vain. His commentator, who doubtless understood him best, begs your attention even to his great master's *et ceteras*. The merits of Coke are very different. He evidently understood arrangement extremely well, though

[1] Dr. Watts so styles it somewhere in his essay on the Mind.

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he totally neglected it in his great work, on which he entered with a thorough knowledge of his subject, and the utmost devotion for his original author. His ideas rise spontaneously and overflow on every topic. Frequently and truly has it been said that giants were in those days. However faulty, in some respects, may be the writers who flourished between the reigns of Elizabeth and Charles the Second, however quaint and pedantic in occasional passages, we perceive in them a robustness and vigour of intellect, and a plenitude of ideas, which throw their successors far behind them in individual attainment and exertion. Our lawyers, as well as our poets and divines, will verify our remark. Indeed the very circumstance which at this day exalts the aggregate mind of society, the increase and diffusion of knowledge, unfortunately lessens the chance of individual elevation, as nothing can be done but by concentration, and great and powerful understandings are the least likely, in an age like this, to make the sacrifice which concentration requires. Of no profession is this so true as of the law; a science, if we may *now* presume to call it so, in its nature, if not in its essence, stationary; and when it attempts to move, merely assuming some new modification, which, while it may meet the exigence which produced it, injures or perhaps destroys its symmetry and consistence by jarring with the fundamental principles which remain unchanged. Hence while its attractive power is lessened from *without*, by the resistless agency of surrounding sciences, which, from their intrinsic beauty and importance, fix our attention and steal us from our avocations, it is sensibly diminishing from *within*, by an inherent and necessary decay; and (speaking more particularly of real property) we are doomed to see its slow but certain change from an elaborate and artificial system, to a clumsy bundle of positive enactments. If we may for a moment join two who are placed at an incalculable distance by their different subject matters, a perishable jurisprudence and the eternal principles of nature, we should say that we can no more expect another Coke than another Shakspeare. But *so* far they agreed, that both, with vast and vigorous minds, were wholly devoted to their own pursuits. With

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the one all was law, as with the other all was poetry. Coke's felicitous exuberance on his own themes,[1] gives an air of meagreness and sterility to the legal compositions of Bacon himself, who reluctantly confesses the wonderful transcendency of his hated rival.[2] Yet partial as we are to the First Institute, and persuaded that he who wishes to become that rare unfashionable being, a deep real-property lawyer, must devote his days and nights to its pages, we would not give it to the pupil, until he has received a clearer insight into conveyancing than he can obtain from Blackstone. We therefore think that there is still a chasm; and we, it is hoped, shall not be deemed presumptuous in attempting to fill it up. For this purpose we shall give in our successive numbers, a series of papers on conveyancing, in which we shall aim, in an easy and familiar style, to develope its principles and explain its practice. Our plan will be simple and popular; we trust it will be found useful. We shall proceed at once to the system in its present modification, and shall consequently presuppose that the reader has crossed its threshold, though he may not have explored its dark and intricate interior.

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## AN INQUIRY INTO THE OPERATION OF THE LATE BANKRUPT ACT, 6 G. IV. C. 16. WITH EXCLUSIVE REFERENCE TO REAL PROPERTY.

THE present bankrupt laws seem at length to have acquired some degree of stability, and their latest modification with respect to land is deserving of serious attention. We do not, however, profess to descend into all the detail which this extensive topic admits of: our proposed limits would be inconsistent with such an attempt, and the multitude of works which have lately

[1] To appreciate this we must read his reports.

[2] We allude to the admonitory letter with which Bacon insulted Coke, immediately after the latter's removal from the situation of Chief Justice. "While you speak in your element, the law, no man ordinarily equals you; but, &c."

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appeared on the bankrupt laws, render it unnecessary. Our particular, if not our only endeavour, will therefore be to evince the peculiar effects of the last bankrupt act[1] on real property, and to correct the errors into which we presume to think some modern writers have fallen into on this department of the doctrine.

I.—It is laid down by a popular writer on this subject as a general rule, that all the property of the bankrupt, real and personal, in possession, remainder, or reversion, to which he was entitled at the act of bankruptcy or afterwards, is vested in the assignees by the assignment and bargain and sale; and his acts thenceforth, with reference to this property, are considered, to all intents and purposes, *as the acts of a stranger*. To which rule (he continues) some exceptions have been made by the statute;[2] which he accordingly proceeds to notice.

The learned author cites no authority for this position, which, however, is in conformity with the opinion which, it is believed, very generally prevails in the profession. But since the late changes in the bankrupt laws, that opinion requires consideration. It is observable, that the doctrine of *relation to the act of bankruptcy*, so as to vest the bankrupt's freehold in the assignees from that time, has been negatived by an express decision, in which, upon a question arising whether an ejectment by the assignees on a demise laid between the act of bankruptcy and the bargain and sale could be maintained, the court held that it could not, and that the freehold remained in the bankrupt, though not beneficially, until taken out of him by the conveyance.[3] This is an extremely important case; but from the manner in which some modern writers have expressed themselves, it seems to have escaped their notice. Mr. Preston, for instance, says that the relation of the title of the assignees is, generally speaking, to the time at which the act of bankruptcy was committed. *Therefore*, says he, if a man commit an act of bankruptcy, and afterwards marry or sell, the dower of the wife, or title of the purchaser, will be defeated.[4] As

[1] 6 G. 4. c. 16. [2] Archbold's B. Law, 124. 2d edit.

[3] Doe v. Mitchell, 2 Maule & Sel. 446. See also T. Jon. 196. 1 Vent. 360, 12 Mod. 3. 5 Mad. 282.

[4] 1 Prest. Abstr. 168.



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the judges who decided the cases subverting the premises from which these and other conclusions might be drawn, positively negatived the retrospective operation of that assurance as to the legal estate, it should seem to follow, that the bankrupt holds the freehold during the intermediate period as a trustee; and if equity adopted this doctrine without giving it a specific modification, and no statutory provision, either expressly or impliedly, met the case, it is evident that there would be some acts by which the bankrupt may defeat the prospective right of the assignees. For if he is a trustee, and might exercise over the legal estate the same powers which belong to any other trustee, he might at any time before the conveyance to the assignees, give a good title to a purchaser for a valuable consideration, and without notice of the act of bankruptcy, &c. When Blackstone lays it down that "all transactions of the bankrupt, with regard to the alienation of his property, are absolutely void;" he expressly grounds his proposition on the assumption that the "commission and the property of the assignees shall have *a relation or reference back* to the act of bankruptcy;"[1] and therefore that principle, if it ever existed, being now subverted as to the real estate, it is certain that the conveyance of the bankrupt before the conveyance to the assignees, will pass the legal, and (if equity has not made the case an anomaly) the beneficial interest also, under the circumstances above adverted to, unless, as we have already hinted, the statute law has deprived it of this power. This draws our attention to the language of the late bankrupt act with reference to the present point; for as it expressly repeals all the previous acts,[2] it is now unnecessary to inquire what peculiar effect any of those may be supposed to have produced. The criterion by which we must determine the validity of the bankrupt's conveyance to a *bonâ fide* purchaser without notice, when the question arises whether, not being within the special protection of a statute, it is supportable as a conveyance from a trustee under the general doctrines of the courts of equity, is the eighty-first section of the 6 G. 4. c. 16. Now that clause enacts that all conveyances, &c. by the bank-

[1] 2 Comm. 485., citing 4 Burr. 32.

[2] Mr. Sugden (Vendors, 667-9.) seems to be against us here; but we are at a loss to account for his opinion. In the 5 G. 4. c. 98. as well as in the last, 6 G. 4. c. 16. the repeal is *express*.

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rupt, *bonâ fide* made more than two calendar months before the date and issuing of the commission against him, *shall be valid*, notwithstanding any prior act of bankruptcy, provided the purchaser had not, at the time of such conveyance, notice of such act of bankruptcy. The statute then proceeds to declare what shall henceforth constitute notice. Now the language of this statute, we must observe, is merely affirmative: it gives *validity* to any conveyance by the bankrupt when made according to its provisions; but it does not expressly *nullify* any conveyance by him which would be valid *otherwise, and without reference to any antecedent statute*. Its terms are not exclusive; and, as there can be no doubt of the intent of the legislature, the act was probably framed under an erroneous impression of the doctrine to which we have adverted. It adopts the language of Romilly's act; but that statute was correctly expressed, because its provisions have relation to the statute of Elizabeth,[1] which made any assurance by the bankrupt *after bankruptcy* (that is, after the *act* of bankruptcy) void, though to purchasers *bonâ fide* and without notice.[2] And as it was by virtue of this *positive enactment*, and not of any *principle*, that the conveyances of a bankrupt after the act of bankruptcy were nullities, it should seem to follow, that on the *repeal* of that statute, it again became necessary to annul the conveyances of the bankrupt by a legislative declaration. Still, however, as the intent of the new statute plainly appears, we may perhaps conclude that, were the point to be raised and agitated, the courts would hold, that a conveyance by a bankrupt *within* two months of the date and issuing of the commission, would be void, notwithstanding the sale were perfectly *bonâ fide*, and the purchaser had no notice. But assuming the soundness of the foregoing data, the statute to have been accurate on this point, should not only have expressly affirmed conveyances made a given time before a certain event, viz. the issuing of the commission, but should likewise have expressly nullified all conveyances of the bankrupt, which were not in conformity with its requisitions.

II.—We shall now proceed to the *mode of conveyance* by the commissioners to the assignees. The assurance which

[1] 13 El. c. 7.

[2] See For. 66, 67.



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the statute requires is "a deed indented and enrolled in any of his majesty's courts of record."[1] It is, we must observe, altogether *sui generis;* the execution of a statute power, equally differing from conveyances at common law, and those which are derived from the statute of uses, on the one hand, and from appointments in pursuance of powers contained in common assurances and operating by way of use, on the other. Thus neither of the former can transfer any contingent or executory interest,[2] but the deed of the commissioners includes not merely estates in reversion and remainder,[3] as well as in possession, but even possibilities.[4] And it is observable that the decisions have not merely established that a contingent interest in realty will pass under the deed of the commissioners, when the event only is contingent, and the person is ascertained, but likewise an interest contingent on account of the uncertainty of the person (as in the instance of a limitation to two persons for their lives, remainder to the survivor of them in fee) without respecting the analogy to the settled distinctions on this point, with reference to the descendability and devisability of contingent and executory interests.[5] Thus, in an early case, where an estate was devised by a father to such of his children as should be living at the death of their mother, and during the mother's life the son became a bankrupt, the court held that the son had such an interest as would pass by the assignment of the commissioners.[6] Still, however, the possibility of a descent, or what (in a case on another branch of law) Lord Kenyon once called the hope of a succession,[7] is not assignable by the commissioners.[8]

III.—From not understanding the precise nature of the assignment of the commissioners, and from attaching an undue importance to the title which it generally bears of a bargain and sale, some modern writers have said, that if the commissioners convey *by bargain and sale,* an enrolment within six months is

[1] Sec. 64. [2] Fearne, 366. 1 Sand. Uses, 108.

[3] Mr. Deacon (Law of Bankruptcy, vol. i. 361.) says, "this *seems to follow* from the language of the sixty-fourth section of the new act." The language of the act is lands, *tenements, and hereditaments.* Consequently reversions and vested remainders being included under both the latter words, are *expressly comprised* in it.

[4] 3 P. Wms. 132. [5] Hen. Bl. 30. ibid. 33. 3 T. Rep. 88.

[6] Higden v. Williamson, 3 P. Wms. 132.

[7] In Roe v. Jones, 1 Hen. Bl. 30. [8] Moth v. Frome, Amb. 394.

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necessary, in consequence of the instrument falling within the statute of enrolments;[1]—an idea strangely erroneous, and arguing a singular ignorance of the principles of our law of real property! The statute of enrolments,[2] as these writers certainly should have known, applies only to bargains and sales which are derived from the statute of uses, and consequently only to those which are made by persons having an estate, and competent to raise a use.[3] Hence, as the late act enables the commissioners to convey *estates tail* by deed indented and enrolled, without requiring the enrolment to be made within six months,[4] enrolment within that time is no longer necessary, and estates in fee simple and estates tail are therefore now precisely on the same footing.

IV.—Another author of a popular work on the bankrupt laws observes, that the sixty-fifth section of the late act gives only a *base fee* to the assignees, and not a fee simple, unless the bankrupt have also the ultimate remainder in fee.[5] How this gentleman fell into so egregious an error we are at a loss to guess! According to this idea, the legislature has rendered a common recovery necessary, whenever the remainder or reversion is in a third person. Now what says the act?—"The commissioners shall, by deed indented and enrolled as aforesaid, make sale, &c. of any lands, &c. whereof the bankrupt is seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, and every such deed, shall be good against the said bankrupt, and the issue of his body, and against all persons claiming under him after he became a bankrupt, and *against all persons whom the said bankrupt by fine, common recovery, or other means, might cut off or debar from any remainder, reversion, or other interest, in or out of the said lands.*[6] Hence it is most clear that *since* the act, as *before* it, the conveyance of the commissioners produces exactly the same effect as might have been produced by the bankrupt himself before the act of bankruptcy. If, therefore, he was tenant in tail in possession, the conveyance of the commissioners has the same effect that his common recovery would have had, and consequently gives an absolute

[1] Eden's Bank. Laws, 225. 2 edit. Holt. 266. [2] 27 H. 8. c. 16.
[3] See 2 Inst. 671. [4] Sect. 65. [5] Arch. Bank. 113. [6] Sect. 65.

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fee, although the remainder or reversion is in a third person, or although there are ulterior limitations by way of future use or executory devise.[1] By parity of reason, when the bankrupt is tenant in tail in remainder after an estate of freehold, with the remainder or reversion in another, the conveyance of the commissioners can give the assignees only a base fee, because the only assurance which the tenant in tail could have adopted for passing his estate, was a fine by proclamations which would have worked no bar to the remainder or reversion. And it is an evident corollary from the same principle, that if, in the case last put, the remainder or reversion in fee is in the bankrupt himself, the conveyance of the commissioners *will* give the assignees an absolute fee, because then the tenant in tail in remainder might by a fine only have himself gained the absolute interest.[2] Mr. Archbold seems to have been led into different conclusions from those we have stated, and which we advance without any fear of contradiction, by the case of Jervis et al. *v.* Tayleur,[3] which by no means warrants his general proposition. In that case a joint commission issued against the tenant for life and the tenant in tail; and it was held that the assignees took by the bargain and sale an estate for life in the premises, and a base fee in remainder, but this upon the express and specific ground, that the conveyance of the commissioners must operate separately on each estate. The circumstance of the tenant for life and tenant in tail being *partners* seems to have been deemed quite immaterial.[4]

V.—It is observable that a bankrupt was always made a party to a conveyance *by the assignees*, in order to prevent the difficulty which the purchaser might otherwise be put to, in maintaining and proving the title; and he is generally made to enter into covenants for the title, in the same manner as he would have done, had he sold the estate while solvent;[5] but he could not have been *compelled* to join with the assignees in the conveyance to the purchaser, until the late act,

[1] 1 Mod. 108. 2 Lev. 28. [2] 1 Salk. 338. 1 Show. 370. 4 Mod. 1.

[3] 3 Bar. & Ald. 557.

[4] Since the above observations were written, we have perceived that Mr. Archbold has withdrawn the proposition we have criticised from the second edition of his work. —See p. 126.

[5] Sugd. Vend. 472. 7th. edit.

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which enacts, that the lord chancellor on the petition of the assignees, or of any purchaser from them, of any part of the bankrupt's estate, (if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity), may order the bankrupt to join in any conveyance of such estate, or any part thereof; and if he does not execute it within the time directed by the order, he and all claiming under him are estopped, and all his estate as effectually barred by such order, as if he had executed the conveyance.[1]

VI.—The clause last noticed may, we think, be construed to extend to any powers which are within the scope of the bankrupt laws; and we think, therefore, that if (what can very rarely happen[2]) the bankrupt has a general power of appointment, without any estate in default of appointment, the assignees or the purchaser might petition the chancellor for an order to compel the bankrupt to join with the assignees in the appointment to the purchaser. For such a power is *an interest* within the meaning of the statute, and the instrument by which it is executed should seem to be a conveyance within the contemplation and policy of the clause above quoted. But it is quite clear that *no other* clause of the act can have this effect. We have made these observations in consequence of an error on this point, into which the author of a valuable treatise on the bankrupt laws has fallen, in supposing that the 77th section compels the bankrupt to execute the power in favour of his assignees.[3] Whereas all which that section does, is to place the assignees entirely in the place of the bankrupt, with respect to those powers which he might have exercised for his own benefit. It simply enacts, that all powers vested in the bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors in such a manner as the bankrupt might have exercised the same. Now we consider it very clear, that if the question

[1] Sec. 78.

[2] We have known this occur in practice in the usual limitations of a modern purchase deed: of course the omission was unintentional, and a clerical error.

[3] Holt, 281.

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whether the bankrupt could be compelled to execute such power in favour of his assignees, depended on this section only, the conclusion to be drawn from it would be diametrically the reverse of that we have been commenting on, and it would be considered now, as before the act, that he could not be compelled. For surely nothing can be more evident than that the operation of this section, as far as the *power* is concerned, is to render any act of the bankrupt quite nugatory, by transferring that power to the assignees, and therefore there can be no object whatever in compelling the bankrupt to join in the instrument, by which it is executed, except to answer the general purposes contemplated by the following section. If therefore, *while it was unsettled,* whether the bargain and sale of the commissioners had the same operation as a due execution of the power by the bankrupt, the courts of equity held that they could not compel the bankrupt to execute the power in favour of the assignees,[1] and the courts of law that the appointment by the bankrupt, after the act of bankruptcy was void,[2] *à fortiori* would they hold so now that the bargain and sale of the commissioners has the effect given to it by the statute, of putting the assignees, with respect to the power, on the same footing exactly with the donee of it, before he became a bankrupt.

VII.—The subject of *mortgages* we shall only notice, so far as to observe, that equitable mortgages (that is, a mortgage by deposit of the title deeds) which the chancellor formerly felt great disinclination to give effect to, as against the assignees of the bankrupt, are expressly included in the 70th section of the new act, and put upon the same footing with other mortgages.

VIII.—There is one point which has not been touched on by the commentators on the new act, and which deserves our consideration. Prior to its passing, it is well known that estates which the bankrupt had as trustee,

[1] Thorpe v. Goodall, 17 Ves. 270.

[2] Doe v. Britain, 2 Barn. & Ald. 93. If these cases do not clash, the judges who decided them evidently entertained different opinions. In the latter, Bayley J., who delivered the judgment of the court, said (ibid. 95.) that on the act of bankruptcy the donee's "power was gone; from that period he became incapable to pass any interest whatever; all his interest having already passed to his assignees."

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did not go to his assignees.[1] But it is now enacted, that if any bankrupt shall, as trustee, be seised of any real estate, &c., it shall be lawful for the chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, &c., on due notice given to all other persons (if any) interested therein, to order *the assignees*, and all persons whose act or consent thereto is necessary, to convey, &c., the said estate, &c., to such persons as the chancellor shall think fit, upon such trusts as the said estate was subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, &c., as the chancellor shall direct.[2] This section certainly seems to proceed on the assumption, that the legal estate in the bankrupt trustee is transferred to the assignees by the bargain and sale of the commissioners: for otherwise the provision is superfluous, as it is nugatory to subject the assignees to a compulsory execution of a conveyance when they have no estate to transfer. We apprehend that many modern conveyancers of respectability have ascribed this effect to the new act, and it is observable that the previous general section (the 64th) is not in *terms* confined to lands which the bankrupt was *beneficially* entitled to. At the same time it is quite certain that the legislature never intended to alter the law in this point; and none of the writers on the subject seem to have entertained the slightest suspicion of its having done so. Mr. Eden (the only one of them, we believe, that has adverted to the clause in question), remarks, and naturally enough, that "as trust estates do not pass by the assignment, the provision may appear unnecessary;" observing, however, that there have been cases (as when the bankrupt was inferred to be a trustee for his wife) in which the court has treated the assignee as a trustee, and ordered him to convey[3].

[1] 1 T. R. 619. 19 Ves. 491. 1 P. Wms. 314. [2] 6 G. 4. c. 16. s. 79.

[3] Eden, B. L. 244. 2nd edit., citing Bennet v. Davis, 2 P. Wms. 316. But we are inclined to regard this decision as proceeding in part on the erroneous assumption of the legal estate passing to the assignee of the bankrupt trustee in all cases: indeed if it does in one, it must in all. See the language of the Master of the Rolls, ibid. 319.

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IX.—The most beneficial effect which this statute has produced is, perhaps,

1st. The certainty which it gives to the title of the purchaser after a given period, by two sections; the former of which[1] enacts that no purchase from a bankrupt, *bonâ fide* and for valuable consideration, when the purchaser *had notice*, at the time of such purchase, of the act of bankruptcy, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy. This we think a beneficial change of the pre-existing law, which, except so far as it was altered by Romilly's act, depended on the 21 Jac. 1. c. 19. s. 14. the analogous time fixed by which was five years; and even that period was no protection, if the purchaser had notice; a circumstance which frequently raised difficulties in practice. The following section[2] enacts that no title to property sold under the commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any claiming under him, in respect of any defect in suing out the commission, &c. unless the bankrupt shall have commenced proceedings to supersede it, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

2dly. The facility which the present statute has given to those private arrangements between an insolvent trader and his creditors, which were before so difficult, and indeed so inexpedient, deserves our applause. Before its enactment, if a trader made a conveyance of his property to trustees, though in trust for *all* his creditors,[3] or of *part* only, if in contemplation of bankruptcy,[4] such conveyance was, if voluntary[5] and by deed,[6] an act of bankruptcy; and though it could be set up as such by those only who had not signed the composition deed,[7] it afforded an objection to the title which there were no means of removing, as it never could be proved to the satisfaction of a court, that all the creditors had concurred in the arrangement. Hence the transaction was obliged to

[1] Sec. 86. [2] Sec. 87. [3] 4 East, 230. 17 Ves. 123.
[4] 3 Wils. 47. [5] 2 Campb. 166. 11 East, 256.
[6] Cowp. 633. 1 Doug. 87. 7 T. R. 71. [7] 8 T. R. 140. 2 T. R. 594. n.

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terminate in bankruptcy, as the only mode of completing the title. But here too arose a difficulty; for, as we have hinted, none of the creditors who had executed the deed could prosecute a commission. Whence it was the practice of some eminent conveyancers to recommend that some creditor, for the sum of 100*l.* or upwards, should withhold his consent, until the real estate was sold under the trust deed. In these composition deeds the land was often conveyed by a separate instrument, reciting an intention of converting it into personalty, and empowering the trustees to give discharges for the purchase money; thus keeping out of the title deeds all notice of the transaction which made the act of bankruptcy. The money was then assigned by the general deed for the benefit of the creditors. But the mischief was that, notwithstanding these precautions, the purchaser would still, in the nature of things, have notice of the insolvency; and, if an unwilling one, might consequently avail himself of any objection which he wished to urge against the title. These trust deeds would, however, if efficient, have been eminently useful, and it was, therefore, expedient that the rigour of the law should be relaxed in this respect. With this view it is now provided, that such a trust deed or conveyance of all a trader's property, for the benefit of *all* his creditors, shall not in future be deemed an act of bankruptcy, *unless* some creditor shall issue a commission within six calendar months from the execution of the deed, provided only that such deed shall be executed by the trustees within fifteen days of the execution thereof by the trader, and that the execution of the trader and trustees be attested by an attorney or solicitor; and that notice be given within two months after the execution in the London Gazette, and two London daily newspapers: or, in case of the trader's residence beyond forty miles from London, in the London Gazette, one London daily newspaper, and one provincial paper near his own residence.[1] It need hardly be observed, that the above observations are still material, inasmuch as we are thrown back on the pre-existing doctrine, when any of these requisitions to the trust deed are wanting. But we cannot forbear expressing our surprise that the present statute should have adopted the language of its predecessors

[1] Sec. 4.

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so far as to make only a conveyance by *deed* an act of bankruptcy; for while this is the case, the policy of the law may be evaded by adopting, when the subject-matter is land, the old conveyance by feoffment, which need not be a deed.[1]

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## ON THE DOCTRINE OF ESTOPPEL WITH REFERENCE TO THE TRANSFER OF CONTINGENT AND EXECUTORY INTERESTS.

SINCE the very general introduction of uses, and the consequent frequency of executory limitations, the doctrine of estoppel has acquired a far higher degree of practical importance than it formerly possessed. We propose, therefore, to discuss it with peculiar reference to those purposes to which it may be subservient in modern practice.

As estoppel has been well defined to be "when a man is concluded, by his own act or acceptance, to say the truth."[2] Lord Coke has divided estoppels into three kinds, viz. by matter of record, by matter in writing, and by matter in pais.[3] The first kind is produced by letters patents, *fine*, *recovery*, &c. The second by *deed indented*, &c. The third by *livery*, *by entry*, &c., acceptance of rent, &c. This division is equally just and important, and we shall accordingly adopt it in the present essay. The circumstances in which it is of the greatest importance to bring this doctrine into operation is, as we have hinted, when a person who is entitled to an executory interest, which the student will remember is not a legal and conveyable estate,[4] is desirous of transferring it. For all that he can do, is to make a conveyance, which will bind him and all those claiming under him, or, in other

[1] Co. Litt. 281. And the statute of frauds, 29 Car. 2. c. 3. has only required a deed *or* note in writing.

[2] Comyn. Dig. Estoppel, A 1. This definition is equally brief and accurate. Lord Coke's 1 Ins. 352 a. is rather wordy and pedantic. His lordship, as usual, developes the etymon of the term, and shows us that it springs from the same root as the common word, *stop*.

[3] Ibid.

[4] Vid. Fearne, 366. 1 Sand. Uses, 108.

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words, which will prevent him and his heirs from asserting their legal rights when they arise. If he has an executory fee simple, it may be laid down as a general proposition, that any conveyance by matter of record, or by deed indented, will work an estoppel. The only exception to this rule (which we submit to be deducible from the authorities) is in the case of a *fine in fee;* for in consequence of the analogy which an executory right has been considered to bear[1] to the right of a disseisee,[2] it has been held that a fine in fee, by the person entitled to it, will operate to the benefit of the possession. The consequence is, that, speaking abstractedly, the only fine which in such a case can be used with safety is the fine surconcessit or for years.[3] This point is peculiarly important when the executory interest is in tail, as then even a recovery works merely a personal estoppel,[4] and nothing but a fine with proclamations binds the issue in tail.[5] But though this is the conclusion we are led to by the express authorities on the subject, with respect to the fine alone, authority and analogy equally warrant its qualification; and we may consider the common law operation of the fine in fee, controlled in this respect by an accompanying declaration of its use. For, if the tortious operation of such a fine, when by a tenant for life, may be precluded by an attendant instrument, showing that the parties meant it should operate differently,[6] it should seem to follow that it would not have the effect of producing an extinguishment, when in avowed pursuance of some instrument by which an intent to extinguish is negatived by a declaration of the use in favour of the grantee.[7] It is true that such instrument is not, strictly speaking, a declaration of uses, as the fine can of course pass no seisin to serve them; but it equally indicates the intent, which is all that appears to be re-

[1] Pollexfen, 66.

[2] Buckler's case, 2 Co. 56. 6th resolution, "that a fine by a disseisee to a stranger, merely works an extinguishment."

[3] Weale v. Lower, Pollexf. 54.

[4] Pig. 123. 10 Mod. 45. 3 Rep. 1. 1 Co. 96.

[5] 3 Rep. 84. Jenk. 274.

[6] Davis v. Bush, 1 M. Clell. & Y. 58.

[7] This was settled, as to powers in gross, by Earl of Jersey v. Dean, 5 B. & Ald. 569. But the express point was involved in Davis v. Bush, (sup.) though unfortunately the court there pointed principally at the tortious operation of the fine, instead of its operation by extinguishment, which was pressed by the bar.

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quired by the authorities, to govern the operation of a fine or recovery. With these decisive analogies, and a judicial recognition of the doctrine we have adverted to, it is perhaps no longer necessary in practice to transfer an executory interest by a *fine sur concessit* for years. There can be no doubt that the courts would give a declaratory deed accompanying a fine in fee, the effect which the parties intended it should produce; and we may now safely regard a title as marketable which depends on that mode of assurance.[1]

It is, however, observable that, settled as the distinction seems to be, between these two species of fines in reference to their abstract or common law operation on a contingent or executory right, very eminent lawyers have overlooked it; and there is one case in practice in which the absence of an express recognition of it in a well-known decision,[2] has been the cause of no small degree of discussion and doubt.[3] Those who are in any way conversant with conveyancing, know, that when testators are desirous of devising their lands[4] in trust for sale, they most commonly give them to the trustees, and *the survivor of them, and his heirs;* a plan resulting from an excess of caution, joined to an ignorance of the manner in which the law of itself modifies a grant of lands to a plurality of persons. The intention of the testator is frustrated by the very means which he adopts to ensure the effecting of it; for instead of the inheritance passing immediately to both trustees, with a capacity of devolving on the survivor, an estate for life only is vested in them, and the survivor takes a contingent remainder in fee. Hence their inability to sell, unless this contingent fee in the survivor can be destroyed or bound. Destroyed it may be in two ways, either by a tortious conveyance (a fine, feoffment, or recovery),[5] from the trustees, or by merger.[6] The former mode is evidently out of the question; the resort to it would involve a forfeiture of the parti-

[1] In support of the *principle* we are contending for, we may further cite 2 Dyer, 157 b. Fitz. H. Estoppel, 211. 2 Rep. 69 b. Moore, 384. Ibid. 615. Skinner, 238. 1 Vent. 278. Carth. 22. 1 Vent. 368. S.C.

[2] Vick v. Edwards, 3 P. Wms. 372.

[3] Fearne, Cont. Rem. 357–9.

[4] When the subject-matter is *copy-hold*, this object should never be attained by a *devise* to the trustees, but by a *power*; as the latter saves the fine on admittance.

[5] 1 Rep. 66. Archer's case.

[6] Purefoy v. Rogers, 2 Saund. 386.

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cular estate, and a consequent right of entry in the heir. The latter mode is unobjectionable, but, of course, can be used only when the heir will join the trustees. Lord Talbot indeed has said, that his concurrence has no other effect than that of supplying the want of proving the will;[1] but his lordship was there clearly wrong, and his error proceeded from his assuming that the fee was in abeyance; a premise from which the conclusion we have rejected, is consistently drawn. But as no point is better settled than that, when the fee is put into contingency by a will,[2] or limitation of use,[3] it is not in abeyance, but in the grantor or heir of the devisor, it follows that when the heir joins the trustees in a conveyance to a purchaser, he passes the reversion. Hence, that estate meeting the estate for life in the same individual, they coalesce, and a merger is the result. It is, therefore, when the heir will not join, or from infancy or other disability cannot, that it is necessary to resort to the doctrine of estoppel, in order to bind the contingent fee in the survivor. In Vick v. Edwards, Lord Talbot said generally, that "a fine from the trustees would pass a title to a purchaser by estoppel;" and cited the case of Weale v. Lower.[4] It is evident, however, from what has been above stated, that if that learned judge laid this down in the general and unqualified way in which it appears in the report, the position is untenable, or rather extremely inaccurate. It should have been confined to a fine for years; for besides that the fine sur conuzance, *taken alone*, would be a forfeiture of the estate for life in the trustees,[5] it would, as we have seen, work not an *estoppel*, but an *extinguishment* of the contingent remainder. But, on the other hand, as his lordship immediately cited Weale v. Lower, as the authority for his proposition, it would be absurd to suppose that he intended to deny the distinction which that case established, and it is consequently to be presumed that he meant a fine for years. Granting this, Mr. Fearne's criticism on this part of the judgment in Vick

[1] In Vick v. Edwards, sup.

[2] Raym. 28. 2 Saund. 280. 1 P. Wms. 505. 2 Bro. Cas. Parl. 1.

[3] 2 Co. 17 b. 10 Co. 78. 85 b. Litt. Rep. 159. 253. 285. Carth. 262. Bac. Uses, 61.

[4] Pollexf. 54.

[5] 1 Rep. 66. admitted by the Court, in 1 M'Clell. & Y. 58.

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*v.* Edwards, is ill-founded; for such a fine is at once innocent in its operation,[1] and capable of binding by estoppel. With respect to the chief question in that case, whether the trustees took an immediate fee, or as they were held to take by Lord Talbot, we should wander from the subject we have proposed to treat, if we entered into it in this place: we shall, however, say that we agree with Lord Talbot's construction of the devise, and upon similar grounds to those on which it has been defended in a recent treatise.[2]

It does not, however, necessarily follow, that because the fee is in contingency in the devise on which we are commenting, a fine for years must be adopted in order to bind that interest by estoppel, when a sale is desirable, and the heir is not a party to the purchase deed. It is certain, that under those circumstances, a tortious conveyance in fee, whether of record, or by matter in pais, would defeat the object it was intended to accomplish, by destroying, instead of binding, the contingent remainder in the survivor; but we have always thought, and a recent determination confirms our opinion, that a conveyance to the purchaser by an innocent assurance, (as a lease and release or bargain and sale) *effected by deed indented*, will have the desired operation as completely as a fine. And here Lord Coke's classification becomes important. The second kind of estoppel is "by *deed indented*,"[3] and so long as an assurance is made by an instrument clothed with this solemnity, the requisition of the law is complied with, and the grantor is estopped. For a long time a contrary opinion prevailed in the profession; but we were persuaded of its erroneousness, and that it flowed from connecting the specific mode of assurance with the instrument by which it was made. Hence the consequent idea, that because the former was void,

[1] Pigott v. Salisbury, 2 Mod. 109.

[2] Cornish on Remainders, &c. 229. Lord Talbot's decision on this point, however, though perfectly consonant to technical rules of construction, evidently clashes with the testator's intention. Hence, when analogous cases arise, we may certainly avail ourselves of any word which furnishes a reason for not applying those rules. We remember a case in practice in which the devise was to trustees to hold to them and the survivors and survivor of them, their heirs, executors, and assigns. The opinion of an eminent and experienced conveyancer was, that the trustees were joint tenants in fee. We agree with him, and on the ground we have adverted to.

[3] Sup. 76.

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the latter was so likewise, and that a lease and release by a person not having an estate at the time of making it, was a mere nullity.[1] But nothing could be stranger than this idea. If the *conveyance* as *such* was *void*, how could the nature of it affect the *abstract operation of the instrument?* We were glad to find that the Vice Chancellor entertained the same opinion, and we trust that his decision,[2] which is demonstrably in unison with the technical distinctions of our ancient law, as well as salutary in respect to social expedience, will be considered to have settled this point. And if we are now to regard it as settled, that a lease and release may work an estoppel when the latter is by a deed indented, which it almost invariably is,[3] it will follow that a title from devisees in trust under the limitation in question, depending merely on that assurance, is undoubtedly marketable; the more particularly, as from the influence of Mr. Fearne's opinion, which is at direct variance with that of Lord Talbot, on the construction of the devise in Vick v. Edwards, many of our most eminent practitioners have been satisfied with a lease and release on the ground of the devisee's taking the immediate fee.

We shall here, however, anticipate an objection which a misconception, or rather too wide an extension, of a position in the First Institute might lead to. "Whensoever," says Lord Coke, "any interest passeth from the party, there can be no estoppel against him."[4] He has given several illustrations of this principle; but it is unnecessary to cite them, as a little reflection will evince that none of them are analogous to the present case. For, beyond a doubt, to the *present purpose*, the particular estate, and the contingent remainder in fee, would be regarded as distinct interests; or rather the estate for life would be deemed the only legal tangible interest, and the latter as a mere possibility. In fact, it has been settled, that it is not a possibility coupled with an interest, so as to be

[1] We believe this opinion to have been drawn from the principle contained in Litt. 1. 446.

[2] Bensley *v.* Burdon, 2 Sim. & Stuart, 519.

[3] As a release by enlargement operates on a reversion, and is consequently in the nature of a grant, it *must* be by *deed*.

[4] 1 Inst. 45 a.



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devisable under the statute of wills[1] or descendable at the common law. It follows that with respect to the contingent fee in the survivor, the lease and release *passes no interest*, and may *therefore* bind it by estoppel.

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## ON THE MODES OF PROCEEDING AGAINST TENANTS HOLDING OVER.

An action of ejectment is, in general, the best remedy for a landlord who seeks to recover the possession of premises from a tenant holding over after the expiration of his term. Cases, however, daily happen, where recurrence cannot conveniently be had to this method of redress. For, not to mention other manifest objections, the inevitable delay which still attends an ejectment suit would often be highly prejudicial. And, again, such might be the poverty of the tenant, that the landlord could not calculate on recovering the costs which he must incur in the prosecution, even of this comparatively speedy remedy. The practitioner, therefore, is often called upon to determine whether the landlord would in such a case be subjected to any and what legal liability, by taking the law into his own hands, and expelling the wrong-doer.

Conceiving that somewhat loose, and even mistaken, notions prevail upon this subject, it is our intention to enquire in what this liability (if any) actually consists.

In the first place, we incline to think that principle and authority concur in establishing that no action could be maintained against a landlord adopting the course in question. The only forms of action which can be alleged, with any show of plausibility, to be applicable to this case, are—trespass *quare clausum fregit;* ejectment; trespass for assault and battery, in case the expulsion is effected by personal

[1] Doe v. Tomkinson, 2. M. & Selw. 165. And the converse of this position is established by 1 Hen. Bl. 30. Ibid. 33. 3 T. R. 88.

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violence; and trespass to personal chattels, in case the eviction of the tenant be followed up by a removal of his goods from the tenement.

In such a case, then, could the tenant maintain trespass against his landlord for breaking and entering his close? and more especially, supposing the entry to have been forcible and violent? We shall abstain from citing the more ancient authorities with regard to this point; not because they at all militate against recent decisions, but that we would avoid encumbering our argument with superfluous matter; and that trespass is not maintainable will sufficiently appear, we think, from the following cases. The case of Argent v. Durrant, 8 T. R. 403. was trespass for breaking and entering the plaintiff's close and pulling down his wall. The defendant pleaded the general issue (together with a special plea not material to the present question), and gave in evidence, that the soil and freehold were his; that he had let the premises to the plaintiff, whose term therein was expired after due notice to quit, but that the plaintiff insisting on his right to continue there, the defendant entered, &c. This was held to be a complete answer to the plaintiff's case. And, indeed, although such evidence of title was urged to be inadmissible under the general issue, yet it was not contented that, if admissible under the general issue, (which however the court, upon argument, decided it to be,) it did not constitute an effectual bar to the plaintiff's action. And the silence, as well of the plaintiff's counsel as of the court, upon this last head, is to be accounted for by the then recent decision in the case of Taunton and Coslar, 7 T. R. 431. This last case was an action of replevin for taking the plaintiff's cattle, &c. The substance of the pleadings was as follows:—The defendant (tenant) avowed under a demise from year to year, of the *locus in quo*, and that he distrained the cattle *damage feasant*. The plaintiff (landlord) pleaded in bar that he gave defendant due notice to quit, by force of which the demise to him determined; after which he, the plaintiff, entered into the *locus in quo*, and put his cattle therein: the defendant (tenant) replied, that he ought not to be barred, &c. because he did not quit or give up the possession of the said place in which, &c. to the plaintiff (landlord), or in any manner abandon the possession of the same in pursuance of



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the notice to quit, &c. To this there was a general demurrer. In support of the replication, it was urged, that if the plaintiff (landlord) could justify his act in this case, it would dispense in future with the necessity of bringing ejectment when the party is entitled to enter against another who holds the possession. But Lord Kenyon C. J., thought the case too plain for argument. He held the replication to be bad, and said, that if an action of trespass had been brought, it was clear that the landlord could have justified under a plea of *liberum tenementum.*

The case of Turner v. Maymot, 1 Bingham, 158. is distinguished from the preceding cases by the circumstance of force being employed in making the entry. Regular notice had here been given to quit, but the tenant did not deliver up possession; whereupon, the landlord, at a time when nobody was within (some little furniture, however, still remaining in the house), broke open the door with a crow-bar, and resumed possession. At *nisi prius*, it was held, that the law would not allow the landlord to re-instate himself in this forcible manner, and a verdict was found for the tenant. But on moving the court above, the judges were unanimous that this verdict was wrong, and a new trial was accordingly granted.

Inasmuch as, in none of the above cases, does an actual expulsion attended with bodily constraint, appear to have been alleged, it would, perhaps, be rash to assert positively that the result would not have been affected by such an allegation. But for the reasons to be presently stated, and also from the arguments of the judges in the case of Taylor *v.* Cole, 3 T. R. 292, there is little ground for supposing that it would. In the last-mentioned case an actual expulsion, under somewhat different circumstances, came in question, and the opinion of the court seemed to be, that the forcible assertion of a civil right was not the subject of a civil action.

It may be worth remarking, that before a party out of possession can support trespass *qu. cl. fr.* against another in the wrongful occupation of his close, an actual entry to revest the possession is essential, and then, but not till then, this action may be supported. Co. Lit. 57. b. and vide Butcher v. Butcher, 1 Manning & Ryland, 220. Now, if the tenant could maintain this action against his landlord, by reason of such an

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entry, with whatever circumstances attended, this apparent absurdity would arise, that one and the same act would invest the landlord and tenant, each with a right of bringing the very same action against the other.

Few words are necessary as to the action next in order; namely, ejectment. *A fortiori*, it cannot be supported. If it can, for what term is the sheriff to be commanded by the writ of *habere facias possessionem* to cause the said John Doe to have the possession? Again: As the plaintiff must herein recover by the strength of his own title, upon what basis is that title founded as against his landlord?

We are next to examine the action of trespass for assault and battery, grounded on the application of so much violence to the person of the tenant, as is sufficient, to expel him from the premises, and no more. Now, upon the landlord's entry, the actual possession is, by operation of law, immediately taken out of the tenant and vested in the landlord. The two parties being adversely on the land together, one or the other of them must be a trespasser. And not only so, but possession being once transferred in this manner, the landlord's entry has a retrospective operation, and he is regarded, by a legal fiction, as having been in the actual enjoyment of his close, *ab initio*, i. e. from the determination of the lease; and the tenant, consequently, to have been committing one continued trespass during all the intervening period. But what is the rule of law, where one man trespasses on the soil of another? Clearly this, that if the trespasser do not instantly depart, upon being requested, such a degree of force, short of wounding, may be lawfully exerted, as will suffice to remove him from the premises. Consequently, if the tenant thereupon declare in assault and battery, and the landlord justify, then, provided the justification cannot be controverted, (and it would appear that it cannot) the tenant's case must fall to the ground.

And with regard to trespass to the personal chattels of the tenant, the landlord may, in like manner, allege in justification that the plaintiff's goods and chattels were wrongfully standing in and upon the premises, and incommoding him, the defendant, in the enjoyment thereof, and that he, the de-

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fendant, therefore removed them, &c., doing no unnecessary damage.

Such being the tenant's prospect of redress, if he resort to an action, what will be the result of his prosecuting his landlord criminally, by an indictment of forcible entry, either under the statute of forcible entry or at common law?

Nothing can well be clearer than that a tenant at sufferance has not such an estate as is protected by any of the statutes of forcible entry. He has a bare wrongful possession, and his estate is, therefore, inferior even to a tenancy at will. Co. Lit. 576. 3 Bac. Abr. title Forcible Entry. Hawkins's P. C. c. 64. The Queen v. Griffith, 3 Sal. 169. Rex v. Bathurst, Sayer 225. Rex v. Wannop, Sayer 142. In this last case, the objection to the indictment was, that it did not therein appear what estate the person expelled had in the premises. And by the court, "it is absolutely necessary this *should* appear; otherwise it will be uncertain whether any one of the statutes relative to forcible entries does extend to the estate from which the expulsion was. The 5 R. 2. c. 7. the 15 R. 2. c. 2. and the 8 H. 6. c. 9. do only extend to freehold estates; and the 21 Jac. 1. c. 15. does only extend to estates holden by tenants for years, tenants by copy of court roll, tenants by elegit, statute-merchant, and statute-staple."

But, on the other hand, it seems that a tenant whose term is expired, holding over by force after demand of possession, is guilty of a forcible detainer, and liable under these same statutes. Snig v. Shirton, Cro. Jac. 199.

If the landlord, therefore, in the case we have proposed, be liable at all, it probably is only to an indictment for a forcible entry at common law. But even if this course were adopted, his liability would be by no means so clear as is commonly believed. As a general rule, it is certainly true, that the preservation of public peace being a consideration of paramount importance in the eye of the law, it will not tolerate such modes of asserting a right of property, as are calculated to produce a breach of the peace. True also, there are several dicta of Lord Kenyon and other modern judges (and the general soundness and discretion of Lord Kenyon's observations, even when extrajudicial, entitle these dicta to the highest con-

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sideration), to the effect that a landlord entering with a strong hand to dispossess by force his tenant holding over unlawfully, may be indicted for a forcible entry at common law. But, on the other hand, it is material to observe, that in a case, apparently the only one wherein an indictment at common law, for a forcible entry, was ever brought directly under the consideration of that great judge, he solicitously guarded the judgment which he then delivered against any interpretation which could affect the present question. The case alluded to is that of Rex v. Wilson, 8 T. R. 357. a case sometimes supposed, but incorrectly so, to establish the landlord's liability. The principal count in that indictment stated, that the defendants, &c. with force of arms, *unlawfully*, injuriously, and *with a strong hand*, entered into a certain mill, &c. being in the possession of one Lewis, and him the said Lewis, from the possession of the said premises, *unlawfully*, injuriously, and *with a strong hand*, expelled and put out, &c. against the peace, &c. To this there was a demurrer, and, upon argument, judgment was given for the crown. In delivering judgment, Lord Kenyon expressed himself, generally, that, in determining that this count might be supported, effect would be given to a part of our law that ought to be preserved; namely, that no one shall, with force and violence, assert his own title. But, upon maturer consideration, he took the opportunity on a subsequent day in the term, of saying, "We wish that the grounds of our opinion may be understood. We do not in the least doubt the propriety of the decision in this case the other day, but we desire that it may not be considered as a precedent in other cases to which it does not apply. Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that, at common law, the party may enter with force into that to which he has a legal title. But *without giving any opinion concerning that dictum one way or the other*, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that *our opinion in this case leaves that question untouched*, it appearing by this indictment that the defendants *unlawfully* entered, and therefore the court cannot intend that they had any title." The passage in Hawkins here alluded to, is; "It seems that, at the common law, a man disseised of lands or tenements (if he

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could not prevail by fair means) might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to enter in due time." This, however, is far from being the dictum of Hawkins alone: much older authorities support the same doctrine.— In Lamb, Justice of the Peace, tit. Forcible Entry, the position is laid down in almost the same terms, and the year books cited as authorities. Bracton has an elaborate chapter, "*De primo remedio post disseisinam*," fol. 162 b. and to ascertain within what time a party disseised may reinstate himself by force. Dalt. c. 76. and Cromp. 70 a, b. take the same view of this question, and so do Reeves, vol. ii. 202. and Blackstone, vol. iv. 148. whose opinions are not altogether destitute of weight on a point of this nature.

It may also be urged, that there is a strong though silent stream of precedent in favour of this position, no indictment at common law appearing to have been ever instituted (at least with success) in the case we are considering: and, moreover, that it receives some countenance from the statute 5 R. 2. which otherwise would have been altogether idle and inoperative. Much stress, however, is not to be laid on these last circumstances; but it is unquestionably very difficult to reconcile the modern dicta we have mentioned, with this very general consent of ancient writers, the other way. There is no denying that the early text-writers must have been better acquainted than we can possibly pretend to be, with the law as it stood in the days in which they flourished; that what was law at any former period of our history, must be law still, unless statutable enactments or adverse decisions have intervened; that no such statutable enactments or adverse judicial decisions *have* intervened; and that, therefore, a court of justice would find some difficulty in deciding an indictment to be maintainable at common law upon an entry pursued with no more force than sufficient to re-establish a party having title to enter, in his rightful possession of the premises. But, on the other hand, the numerous recent dicta that are opposed to this conclusion, the altered constitution of society, the distinction that may be taken between the case of a disseisin (to which alone the ancient dicta may be contended to have been directed) and that of

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a wrongful holding over upon an entry originally lawful, and, above all, the existence of the general principle, mentioned in the outset, that private rights are not to be asserted at the hazard of endangering public peace, together with the temper of the courts to give effect in every conjuncture to a rule so conducive to tranquillity, all these circumstances in co-operation, render it not improbable that such an indictment would, in the present day, be held sustainable.

When we recollect, however, that a tenant so dispossessed, could obtain, by indicting his landlord, no restitution of possession, and must be put to considerable expense, without any equivalent or compensation; and also, that the punishment inflicted upon the landlord (supposing the indictment to lie) would probably, unless in an outrageous case, be merely nominal; this part of the question will not appear very likely to be soon decided.

In conclusion, it may be useful to remark, that, if the landlord can obtain possession without violence, during the absence though only temporary of the tenant and his family, there would seem to be no pretence for calling the entry a forcible one. With respect to what will constitute a forcible entry, there must exist a close analogy between forcible entries under the statutes and forcible entries at common law; and it has been held, with regard to the former, that if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force — these will not be forcible entries. But for the various shades by which cases of this sort may be distinguished, we must refer our readers to the express treatises on the subject, in Burn's J. P., Hawkins's P. C., Comyn's Dig., and Bacon's Abr.

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## ON THE CUSTOM OF MAKING ALLOWANCES OUT OF THE POOR-RATE TO ABLE-BODIED LABOURERS IN INCREASE OF THEIR WAGES.

THERE are now depending in parliament several bills for the amendment and alteration of the poor laws. It is not our intention at present to give any detail of their various provisions, or of the different plans of improvement suggested by different members of the legislature. But there is one part of these laws to which we are anxious that the public attention should be more generally directed. It is well known that a system has grown up, in several of the southern counties, of paying a certain portion of the wages of agricultural labourers out of the poor rates. There are, it seems, about sixteen counties over which this practice has spread, and in these it is completely established. The quantum to be paid to each labourer by the parish is settled and well known both by the parish officer and the pauper, and in most parishes it is contingent on the number of children which the pauper has. The tendency of this abuse of the poor laws is self evident: in fact, those counties in which the abuse exists are separable from others in which it does not exist, by a line, on one side of which are high wages and low rates, on the other low wages and high rates.[1]

This important branch of the poor law system was brought under the notice of the House of Commons by Mr. Slaney, on the 17th of April last. On that day he moved for leave to bring in a bill to declare and amend the existing laws relating to able-bodied paupers. His motion embraced other objects connected with the administration of the poor laws; but to those it is not our intention at present to advert. The one which we have mentioned above is the subject of the following remarks. We shall limit ourselves even more closely; for it is to one part only of that subject, to which we mean to confine ourselves. Remarkable as is that state of things to which we have just alluded, and important as

[1] Mr. Slaney's speech in the House of Commons, 17th of April.

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its consequences must be to the morals and independence of the poor, it forms no part of our present plan, either to examine the causes whence the system originated, or to trace out the consequences that may ultimately flow from it. It is sufficient for us to enquire into the legality of the practice such as we find it: we leave it to the legislature to decide on its expediency.

The question which we propose to discuss is the following: whether able-bodied persons in full work, but at wages insufficient for the maintenance of themselves and their families, are entitled to parochial relief.

Most of our readers will be aware that this question, or one precisely similar to it, came before the court of king's bench in Rex v. Collett, 2 Barn. & Cres. 324. The only difference was, that in the case just cited, pecuniary relief had been given to able-bodied workmen out of employment; in the case under discussion, relief is given to paupers in full work. The court of king's bench gave no opinion on the case submitted to them, but said that, before they determined whether the overseers were or were not justified in giving pecuniary relief to the unemployed poor, the case must go down to the sessions again, that the court might be informed whether any, and if any, what endeavours had been made to procure employment for them.

The question which we are now considering cannot be got rid of like the question in Rex v. Collett. The parish officers cannot be called upon to set to work paupers who are already fully employed. So that the simple question remains, whether the parish officers are authorized by the statute 43 Eliz. c. 2., or otherwise, to relieve paupers circumstanced as above described. We are of opinion that they are not; and for the following reasons:

Many provisions for the relief of the poor were made by the legislature before the passing of the 43 Eliz. c. 2. All of them are confined to the same objects; the relief of "impotent, &c. persons, being not able to work," and the punishment of sturdy beggars and others who refuse to work. The first legislative enactment for setting to work the able-bodied poor, is contained in the 14 Eliz. c. 5. s. 23. It provides that "three justices of the peace, whereof one shall be of the quorum,

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with the surplusages of the said collections, &c. (the said poor and impotent people satisfied and provided for), shall by their discretions, in such convenient place and places within their shires as they shall think meet, place and settle to work the rogues and vagabonds that shall be disposed to work, born within their said counties, or there abiding for the most part within the said three years, there to be holden to work by the oversight of the said overseers to get their livings, and be sustained only upon their labour and travail."

Next to this statute follows that of the 18 Eliz. c. 3., made to amend the former act. This statute makes further provision for setting to work such poor and needy persons as were able to do work, but stood in need of relief. The law remained in this state till the passing of 39 & 40 Eliz. c. 3. That act made further provision for the relief of the impotent, and the employment of the able-bodied poor. The 43 Eliz. c. 2. embodied all the provisions in the former acts, which the experience of their operation suggested as expedient. By that statute it is enacted, that the churchwardens and overseers of the poor, or the greater part of them, should take order from time to time, with the consent of two or more justices of the peace, for setting to work the children of all such whose parents should not by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children, and also for setting to work all such persons married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by: and also to raise weekly or otherwise by taxation of every inhabitant, &c. a convenient stock of flax, hemp, wool, thread, iron and other necessary ware, and stuff to set the poor on work, and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for the putting out of such children to be apprentices." There seems to be nothing in any of the enactments of this statute, or of those which preceded it, that can be so construed as to impower the overseers to give relief to able-bodied persons in any other manner than by setting them to work. In Rex v. Collett, the overseers had given pecuniary relief to able-bodied persons who were out of employment,

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and it was argued in support of what they had done, that labourers out of employment, and who were unable to procure employment, came within the description of "impotent persons" whom the 43 Eliz. c. 2. directs the oversseers to relieve. An *obiter dictum* of Eyre J. in Waltham v. Sparkes, Skin. 556. Comb. 320. was cited in favour of this interpretation of the word "impotent," but it is an interpretation which can scarcely be forced upon that word, and which is inconsistent with the meaning that has been put upon that word in several decided cases.* But, be this as it may, it would be a clear misapplication of terms to describe as "impotent" able-bodied labourers in full work. It was contended by counsel, in the argument in Rex v. Collett, that the preamble to the 8th & 9th Will. III. c. 30. shewed that labourers out of employment were then considered by the legislature entitled to parochial relief on that ground. The preamble alluded to begins as follows: "Forasmuch, as many poor persons chargeable to the parish, township, or place where they live, merely for want of work, would in any other place where sufficient employment is to be had maintain themselves and families." The answer to the inference drawn from this preamble is obvious, and was given to it when that argument was used. It was not denied that persons might become chargeable "merely for want of work," but it was said that such relief only should be given as was pointed out by the 43 Eliz. c. 2.: that such persons were to be relieved by having work found for them, and in no other manner; that the legislature never contemplated any different mode of relief, whether the labour should be profitable or not: that the second section of that act was a clear legislative recognition of this principle; for in that section, it was expressly stated, that the enactment therein contained, was made "to the end that the money raised only for the relief of such as were as well impotent as poor might not be

* See Rex v. Gulley, 1 Bott. 366. Rex v. Litton, ib. Anon. 5 Mod. 397. Kilbeck's case, 2 Keb. 37. pl. 79. It may also be remarked, that the 13 & 14 Car. II. c. 12. s. 3. speaking of labourers going out of their own parish to work in harvest, says, "if such persons shall not return when their work is finished, or *shall fall sick or impotent whilst they are in the said work*, it shall not be accounted a settlement." From the manner in which the word "impotent" is used in this statute, the legislature appears to have considered it as synonymous with "unable to work," not "unable to procure work."

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misapplied and consumed by the idle, sturdy, and disorderly beggars." We believe this to be a sufficient and satisfactory answer to any inference drawn from the preamble of the 8th & 9th Will. III. c. 30.

By the 43 Eliz. c. 2. competent sums of money are to be raised "for the necessary relief of the lame, impotent, old, blind, and such other among them *being poor and not able to work.*" We are at a loss to conceive how the description here given of the persons who are to receive pecuniary relief, can be applicable to able-bodied labourers in full work. Yet those who contend for the legality of the payments which are every day made out of the poor rates to such persons, must go this length; unless indeed the authority of the overseers to give relief in such cases, is derived from some subsequent statute. For in the 43 Eliz. c. 2., there is no other description given of the persons who are to receive pecuniary relief: there is no description given of the persons entitled to any other kind of parochial relief than merely the receiving employment, which can be made to comprehend within it the class of persons we are now speaking of. Indeed the legislature of that period shews distinctly that it was not their intention that able-bodied labourers should, under any circumstances, receive pecuniary assistance. For the statute 43 Eliz. c. 2. s. 1. mentions both the unemployed and employed labouring poor; and it points out the manner in which the overseers are to act towards each. It directs that the unemployed are to be set to work. It also expressly mentions the class of persons now under consideration; viz. the employed poor, who are unable to keep and maintain their families, and it points out the manner in which the parish officers shall act towards them. It directs that the overseers shall take order, from time to time, for setting to work their children; but it gives no power of granting them relief in any other manner. The omission of all mention of pecuniary relief, shews that it was not the intention of the legislature of the 43 Eliz. that pecuniary relief should under such circumstances be given.

Assuming then, that the statute 43 Eliz. c. 2. does not authorize the overseers to give relief to the able-bodied poor when in full work, it remains to be considered, whether by any subsequent statute such authority is given them.

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The 36 Geo. III. c. 23. is sometimes quoted as having this effect. Let us examine the object which that statute had in view. The statute 9 Geo. I. c. 7. s. 4. enacted, that if any poor person should refuse to be lodged in the poor-house, he should not be entitled to receive collection or relief from the churchwardens and overseers of the poor. The 36 Geo. III. c. 23. after reciting that the above provision had been found to be inconvenient and oppressive, inasmuch as it often prevented an industrious poor person from receiving such occasional relief as was best suited to his peculiar case, goes on to enact, that "it should be lawful for the overseer of any parish, with the approbation of the parishioners, or the majority of them, in vestry assembled, or with the approbation in writing of any of his Majesty's justice or justices of the peace, usually acting in and for the respective district, to distribute and pay collection and relief to any industrious poor person at his own house, under certain circumstances of temporary illness or distress, and in certain cases respecting such poor person or his family; or respecting the situation, health, or condition of the poor house, although such poor person should refuse to be lodged within the poor-house, any thing in the said act 9 Geo. I. to the contrary notwithstanding. By sec. 2. it is enacted that any justice of the county, &c. may, at his discretion, direct and order collection and relief to any industrious poor person, and he shall be entitled to ask and receive such relief at his own home, notwithstanding a contract shall have been made for lodging and employing all the poor of the parish in the poor-house.—Sec. 3. Provided always, that the special cause, *as hereinbefore mentioned,* of ordering and directing collection or relief to any poor person at his own home, be assigned and written on each order for relief, given and directed by any justice as aforesaid." Taking the whole of this enactment together, it is plain that it was not the intention of the legislature to give a claim for relief to any class of persons not before entitled to it; but to regulate the manner in which the relief should be given. It cannot escape the observation of any one, that the words "under certain circumstances of temporary illness or distress, &c." govern the whole that follows them. When the 2nd section enacts that a justice may order relief to any industrious poor person, at

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his own home, its enactment is controlled by the proviso of the third section, that the "special cause, *as hereinbefore mentioned*," of ordering relief, be assigned on each order. The "special cause as hereinbefore mentioned" can have reference to nothing, but to the "certain circumstances of temporary illness," &c. Those circumstances of temporary illness, &c. are the only causes of granting relief, which have been mentioned in the preceding part of the statute. If the above be the proper construction of the statute, and it is incapable of any other, the legality of giving relief out of the poor-rate to able-bodied labourers is unaffected by its enactments, and the practice is therefore legal or otherwise, according as it is or is not sanctioned by the 43 Eliz. c. 2.

The force of this argument will appear more strongly, if the object be kept in view for which the 36 Geo. III. c. 23. was passed. It has already been stated, that the 9 Geo. I. deprived the poor of all right to parish relief, unless they consented to be lodged in the poor-house. The 36 Geo. III. c. 23. was intended so far to diminish the rigour of the 9 Geo. I. as to obviate the necessity of sending the distressed to the poor-house, under all circumstances; and for that purpose it was enacted that they might, "under certain circumstances," be relieved at their own homes. It was not the intention of this enactment to add a new class of persons to those already entitled to relief; but to provide that those, who were already entitled thereto by the 43 Eliz. might, under certain circumstances, be relieved without being compelled to go into the poor-house.

The next statute, bearing upon this subject, is the 55 Geo. III. c. 137. The third section of this act extends the time during which relief might be given under the provisions of 36 Geo. III. c. 23. The orders of relief to poor persons at their own homes, given under the last mentioned statute by one or more justices, were to continue in force for one month only; and they could only be continued from month to month, by an order of two justices. The 55 Geo. III. c. 137. s. 3. after reciting the powers given to justices by the 36 Geo. III., and that it was expedient, that justices should be empowered to order relief to be paid to poor persons, *in the cases mentioned in the said act*, for longer periods than one month at a time,

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enacts " that it should be lawful for any justice or justices of the peace, *in the cases and in the manner mentioned in the said act*, to direct and order relief to be paid to any poor person at his own home, for any period not exceeding three months, and that two justices might make a further order for the like purpose, for any period not exceeding six months. Our only object in citing this statute, has been to make it clear that, although it extends the time for which a justice may order relief to be given to the poor at their own homes, it does not make any difference as to the class of persons to whom relief is to be given, or in the circumstances in which it is to be given. We are not aware of any subsequent statute which affects this question, unless it be 59 Geo. III. c. 12. s. 5. and that section merely enacts, that every order of relief, in parishes not having a select vestry, shall be made by two or more justices; that every such order shall specify the special cause of granting relief, and that no such order shall be in force for any longer time than one month, from the date thereof.

If the preceding remarks be correct, the parish officers are not authorised by the 43 Eliz. c. 2. to give relief, out of the poor rate, to all able-bodied paupers in full work. We have also shewn that the 36 Geo. III. c. 23., the only statute which is even asserted to have extended the power of the overseers in this respect, does not empower them to give relief to the poor at their own homes, except " under certain circumstances of temporary illness or distress, and in certain cases respecting a poor person or his family, or respecting the condition, &c. of the poor-house." We presume, therefore, that we have fairly established that the practice, which we have been alluding to, is illegal, unless its supporters can shew that *able bodied labourers, in full work*, are to be considered " under certain circumstances of temporary illness or distress," or that their case is one of those " certain cases, respecting such poor person or his family, or respecting the condition of the workhouse," in which, only, it was the intention of the legislature that relief should be given to the poor at their own homes. There is no pretence for saying that poor persons, circumstanced like those whom we are now speaking of, are " under circumstances of temporary illness, or dis-



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tress." And we trust we have already shewn that, by the "certain cases respecting poor persons or their families, or respecting the condition of the workhouse," the legislature of the 36 Geo. III. meant certain of those cases, only, where the poor person or his family were, by the laws then in force, entitled to relief.

On a careful review of the whole case, we have come to the conclusion that the practice of paying a part of the wages of able-bodied labourers out of the poor rate is a misapplication of that fund. We are also of opinion that, independent of its being a misapplication of the poor rate, it perverts the whole system of the poor laws, by introducing a species of relief, which it was not the intention of the legislature, either in the time of Elizabeth, or in any subsequent reign, to introduce. The object of the poor laws is, that the impotent poor should be relieved, and that the able-bodied should be set to work. But as to eking out the wages of able-bodied labourers, whenever those wages are too low, that is a practice which these laws no where recognize, and which they certainly do not sanction. "According to the poor laws, he who is able to labour is to be maintained by labour only, and nothing is to provided for him but a means of employment."[1]

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ON THE EFFECT OF AN ASSIGNMENT BY THE HUSBAND, FOR A VALUABLE CONSIDERATION, OF HIS WIFE'S LEGAL CHOSES IN ACTION, AS AGAINST HER SURVIVING.

THE degrees by which our law of property has been elaborated from a few simple maxims, into the vast and complicated system we have now to deal with, could not perhaps be better illustrated than by a review of the cases which, from time to time, have come under the consideration of the courts of law and equity, relative to the mutual rights of the parties to the marriage contract. But, however interesting such an investigation might be to the juridical philosopher, a subject of in-

[1] Per Best J. in Rex v. the Justices of the N. R. of Yorkshire. 2 Barn. & Cres. 292.

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quiry more immediately useful presents itself to our notice. The transactions hourly arising out of the relation of husband and wife are so numerous and complex, that the existence of a doubt on the legal effect of any of them, is a great practical evil; in removing which we shall endeavour to assist, by extracting the principles of the cases relating to the point we have selected for discussion.

The courts of equity, in dealing with such property of a married woman as comes under the denomination of a "chose in action," have ever professed to observe in their decisions an analogy to the rule of law which leaves to a wife surviving her husband, the full benefit of that property, unless it shall have been "reduced into possession" by the husband during the coverture.[1] They have at the same time, in recognizing and enforcing assignments of choses in action (if made for valuable consideration), proceeded directly in opposition to another legal principle; which, with a view of preventing litigation, forbids the transfer of interests of that nature.[2] Hence the effect of an assignment of a married woman's choses in action has been frequently, during a long series of years, a subject of doubt and discussion in the courts of equity. Parties interested under assignments of various descriptions, have struggled, by means of the jurisdiction of those courts, to establish their claims to personal property of this nature belonging to married women, in opposition to the legal right by survivorship of the latter. Availing themselves of the determination of the courts of equity to support assignments of choses in action, those parties have pressed them to proceed from the open infringement of one legal principle, to the virtual abolition of another; by putting such an "equitable" construction upon that requisition of the law by which the wife's choses in action must be "reduced into possession," as would bring *assignments* of them within the terms of the rule. Amidst the multitude of decisions upon this subject, some of which overturn the preceding, and many of which appear to have been decided upon irreconcilable principles, it is satisfactory to observe that the courts of equity have in later times become more and more anxious to preserve from innovation the an-

[1] Co. Lit. 351 a.

[2] Ibid. 214. a. Ibid. 232. b. Butl. No. 1.



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cient legal rule in favour of the wife; and to restore it, where it had been violated, to its primitive integrity.

One question with reference to it, appears to some to be still open to discussion; namely, *the effect of an assignment by the husband for valuable consideration of his wife's legal choses in action, as against the wife surviving.*

We propose, therefore, succinctly to consider, with reference to the terms of the rule, and the principal decisions bearing upon this question, what ground there is for supposing such an assignment to be good in equity, as against the wife surviving, in the event of the husband's dying before the assignee shall have gained possession of the property. In order to simplify the inquiry, it will be proper to exclude from it any notice of the effect of a settlement before marriage, by the husband upon his wife, in rendering him (in equity) *a purchaser* of her choses in action; and also to avoid touching upon that (until lately) much contested ground, the effect of an assignment of the wife's *reversionary or contingent* choses in action.

The doctrine of the law is thus laid down by Lord Coke.—"Marriage is an absolute gift of all chattels personal in possession in the wife's own right, whether the husband survives the wife or no; but *if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them.*"[1] It is thus expressed by a modern writer on the law of husband and wife. "Marriage is only a qualified gift to the husband of the wife's choses in action, viz. upon condition that he reduce them into possession during its continuance; for, if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it."[2] The first of these propositions sufficiently denotes what description of property is the subject of our present consideration; and the terms employed in both in stating the requisition of the law respecting it, are so plain as to seem to require no explanation. Some legal writers, however, have thought it necessary to tell us "what is a reduction into possession;" and, classing with the actual receipt of the property, certain other

[1] Co. Lit. 351 a. [2] 1 Roper's Law of Husband and Wife, 204. 2d edit.

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acts and proceedings, not attended with the occupation of it, have assumed in the outset, that the law has employed the terms "reduction into possession," in a technical sense, contradictory to their primitive signification. If there were any established modes by which property of the wife remaining "in action" at the time of the husband's decease (unaffected by the operation of a settlement before marriage) could be vested in his representatives, to the exclusion of the wife, the simplest course would be, after laying down the rule, to state these modes of acquisition as *exceptions* to it. But to state, as instances of reduction into possession, acts unattended by occupation of the property, is most unnecessarily to bring upon the phraseology of the law the highest reproach which can be cast upon language employed to express "rules of civil conduct" for the governance of the community, namely, that of being an arbitrary jargon in which the terms employed sometimes signify the reverse of what they convey to the understandings of the community. Thus a learned writer[1] has laid it down that "the acts to effect the purpose of reducing the wife's choses in action into possession must be such as to change the property in them, or in other words, must be something to divest the wife's right, and to make that of the husband absolute; such as *a judgment* recovered in an action commenced by him alone, or *an award of execution* upon a judgment recovered by him and his wife, *or receipt of the money*, or *a decree in equity* for payment of the money to him, or to be applied to his use." There appears to be here an inaccuracy of classification which may lead to confusion of ideas, and to conclusions not merely erroneous, but prejudicial to the rights of innocent parties. A chose in action is defined to be property recoverable by suit or action at law.[2] Now the effect of a judgment or decree is to change the nature of the subject matter. The property ceases to be a thing for the recovery of which an action or suit must be brought, and is thereby, and not by any conceivable effect upon the possession, taken out of the application of the rule which gives to the wife surviving, such property originally her's as remains "in action" at the time of her husband's decease. As on the contrary, in the case of an assignment of a chose in action, that

[1] 1 Roper, Husband and Wife, 208.

[2] See 2 Blac. Com. 396.

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is, of the husband's right to reduce the thing into possession, there is (as the very terms imply) the same necessity on the part of the assignee, as on that of the assignor, of bringing an action for the recovery of the possession, we cannot, without absurdity, attempt (as has been sometimes done) to reason from the effect of a judgment, or decree, to that of a transfer of the right of action.

That an intention on the part of the husband to reduce the "chose" into possession,[1] or his actually deriving a pecuniary advantage from it, short of the actual reduction of the whole, (as by receipt of part, and of interest on the residue) will not bar the wife's claim, is settled.[2] If, therefore, the assignment of the wife's chose in action for valuable consideration defeats the wife's title by survivorship, it must be upon grounds peculiar to itself.

It was formerly contended, and several times decided, that even an involuntary assignment, (as in case of bankruptcy) defeated the right of the wife. Thus in Bosvil v. Brander,[3] (in 1718) where a feme mortgagee in fee married a person who became a bankrupt, and died, the widow brought her bill against the assignees for recovery of the title deeds. Sir Joseph Jekyll, after deciding first in favor of the widow, ultimately dismissed her bill. He grounded his judgment upon a distinction now clearly untenable, and at the same time admitted a principle which seems irreconcilable with his decision. "It might" he said, "have been a matter of different consideration, if the assignees had been *plaintiffs* in equity, and desired the aid thereof to strip an unfortunate widow of all that she had in the world; towards the doing of which equity would hardly have lent any assistance, *because the assignees claiming under the bankrupt husband could be in no better plight than the husband could have been.*" Even so late as Pringle v. Hodgson,[4] it was held by Lord Rosslyn, that, "the question of survivorship was quite laid aside by the bankruptcy." On the other hand, Lord Hardwicke in Grey v. Kentish,[5] and Lord Bathurst in Gayer v. Wilkinson,[6] decided in favor of the wife against the assignees. At length it was solemnly decided by

[1] Blount v. Bestland, 5 Ves. 515.
[2] Nash v. Nash, 2 Madd. 133.
[3] 1 P. Wms. 458.
[4] 3 Ves. 617.
[5] 1 Atk. 280. S. C. 1 P.W. 459. n.
[6] 1 Bro. C. C. 50. n. 2 Dick. 492.

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Sir William Grant in Mitford v. Mitford,[1] that an assignment in bankruptcy does not bar the legal right of the wife surviving; upon the principle, that "the assignment from the commissioners, like any other assignment by operation of law, passes the bankrupt's rights precisely in the same plight and condition as he possessed them." The principles laid down by Sir William Grant in his elaborate judgment, are very important with reference to the present question. "With respect to choses in action," he said, "they are not assignable at law, consequently the husband's assignment of them cannot prevent their legally surviving to the wife. In strict analogy, therefore, *equitable interests of the nature of choses in action* ought not to be affected by his assignment. But in equity a distinction seems to have been made between a voluntary assignment, and an assignment for valuable consideration. The wife surviving is not bound by his voluntary assignment. That was determined in Burnet v. Kinaston,[2] which case has been ever since adhered to, and acted upon." The "equitable interests" here mentioned as being assignable for valuable consideration, we may conclude to be, funds in court, or in the hands of trustees, legacies, residuary estate, and the like. Even with respect to these equitable choses in action, as they are called, Sir Thomas Plumer seems to have considered the decisions of the courts of equity somewhat anomalous in establishing assignments of them against the wife surviving. In Johnson v. Johnson,[3] speaking of a fund in court belonging to a married woman who had survived her husband, he said: "If it were now a new point, it would be difficult to understand how the assignee could be in a better situation than the husband himself; for the assignment does not reduce it into possession, it still remains a chose in action, and its being a chose in action gives the wife a right by survivorship. But it is too late to consider this; for it is decided that an assignment for valuable consideration being a disposition of the property, is sufficient to bar the right of the wife surviving.[4] It does not, however, take away her equity."[5] It is

[1] 9 Ves. 87., and see Carr v. Taylor, 10 Ves. 578.

[2] 2 Vern. 401. Prec. Chan. 118. [3] 1 Jac. & Walk. 476.

[4] See Earl of Salisbury v. Newton. 1 Eden. 370.

[5] See cases cited in Elliot v. Cordell, 5 Mad. 149.

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here to be observed, that though the courts of equity may seem to have deviated in this respect from the rule that "equity will not take away the benefit of survivor from the wife, of such things as the law has cast upon her,"[1] yet there is a reason exclusively applicable to a married woman's equitable interests, which seems to afford a sufficient warrant for their so doing. We are to remember that the principal object a court of equity has in view with regard to the property of a woman in its own power, or which is to be reached only by its authority, is, to obtain a settlement for her out of it.[2] Subject to that consideration, it regards such property as belonging to the husband, and disposable by him during his life. "Her equity," said Sir William Grant, in Woollands v. Crowcher,[3] "is, not to prevent his receipt of it (for *it belongs to him*), but to have a settlement, and the court requires her consent to the payment to him without a settlement." In compelling the assignee therefore to make a settlement, the object of the court with regard to such property is answered. Moreover, as interests of this nature are cognizable solely in the courts of equity, those courts, in allowing the husband a power of sale over them, infringe no principle of law. They observe, with respect to the subjects of their peculiar jurisdiction, an analogy to the rule of law so far as is compatible with the objects of that jurisdiction. Allowing these reasons to be sufficient for the determinations of the courts of equity with respect to mere equitable interests, it is obvious that they do not at all apply to legal choses in action—property recoverable without their intervention, out of which they have no power of enforcing a settlement, and of which they cannot deprive the wife without distinctly violating a principle of law in analogy to which they profess to act, even with respect to subjects peculiarly cognizable by them. However, it has been frequently asserted in arguments of counsel and in treatises, that an assignment of the wife's choses in action, legal as well as equitable, will be supported in equity, (if made for valuable consideration) against the wife surviving. In Mitford v. Mitford, Sir William Grant thus alluded to the doctrine, in order to get it out of his way in considering the

[1] Tr. of Equity, B. 1. ch. 4. s. 24. [2] Packer v. Wyndham, Prec. Chan. 418.
[3] 12 Ves. 177.

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effect of an assignment in bankruptcy. " By assignment for valuable consideration, *it is said*, she (the widow) is bound both as to choses in action, and equitable interests. Bates v. Dandy,[1] and Lord Carteret v. Paschal."[2] The first of these authorities is always cited as that upon which the doctrine in question rests for support.[3] It is simply an *obiter dictum* attributed to Lord Hardwicke, that " the husband may assign the wife's chose in action or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration." With respect to this proposition it may be remarked, without in any degree derogating from the respect due to any legitimate expression of the opinion of that great judge, that it is contained in what we have reason to know (from the statement in the Registrar's book),[4] to be an exceedingly imperfect and garbled report of the case. Could we suppose it to have been laid down by his lordship as a principle upon which his decision was founded, or which had anything to do with it, we might more safely place some reliance upon it. But, it is certain from the facts of the case, as stated in the official record of it, that the dictum in question was wholly uncalled for by the circumstances upon which Lord Hardwicke had to adjudicate. The case turned upon the validity as against the wife surviving of a deposit made by the husband, with an agreement to assign (by way of security for a debt) certain mortgages, one in fee, and another for a term of years allotted to the *husband and wife*, as the wife's share of a residuary personal estate; which share, at the time of such deposit and agreement, had (as appears from the Register Book, though not from the report), been transferred *to the husband and wife*. The legal estates in the mortgages remained outstanding, the parties in whom they were vested covenanting to convey or assign them to *the husband*, or as he should appoint. Under these circumstances (the specific property in question never having been exclusively the wife's choses in action), there could, it should seem, be no doubt of the husband's power of disposition in equity, with or without consideration. In Carteret and Paschal, it is merely stated, that " It was agreed, that where the baron is in right of his

[1] 2 Atk. 208.
[2] 3 P. Wms. 197.
[3] See 1 Fonbl. Equity, 318.
[4] 1740. A. 408, 409.

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wife entitled to a chose in action, as he may release or forfeit it, so if he should assign for a valuable consideration, it would be good." This observation also bears no relation to the subject of the decree in that case; which was grounded upon the fact of the husband's having acquired a legal power over the property in question, by the possession of certain premises. Such are the authorities in support of the proposition in question! The following observation of Sir Thomas Plumer, in Purdew v. Jackson,[1] seems justly applicable to the stress which has been laid upon them. "It is possible that opinions may occasionally be afloat, founded on loose expressions and scattered dicta, sometimes uttered without mature consideration, sometimes inaccurately or imperfectly reported, which pass from one man to another, and are gradually received and acted upon as forming the law, without sufficient authority for such a conclusion." This learned judge, in the case just cited, (in which it was after great discussion and deliberation settled, that an assignment for valuable consideration of the wife's reversionary or contingent interests does not defeat her claim by survivorship), took occasion to ask,[2] "Is there any case in which the husband having assigned the wife's present chose in action, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife?" The counsel for the assignee in that case (Mr. Sugden) admitted that he knew of none.

While upon the subject of authorities, it would be improper to pass without notice an inaccuracy into which Mr. Roper appears to have fallen, in so stating the substance of Sir William Grant's judgment in Mitford v. Mitford, as to lead his readers to conclude, that the learned judge signified his opinion, that a sale of the wife's chose in action by the assignees of the husband, under a commission of bankrupt, would have the effect of defeating the wife's claim by survivorship. The inference to be drawn from this proposition, with respect to the husband's power, is so obvious, that it is important to shew with what fairness the proposition has been ascribed to that judge. Mr. Roper states,[3] that in Mitford v. Mitford, "Sir William Grant decided in favour of the wife, upon the princi-

[1] 1 Russell, 63. [2] Ib. 19. [3] 1 Husb. & Wife, 229.

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ple, that this being *a chose in action* and not reduced into possession during the husband's life, survived to her; and that an assignment under a commission of bankruptcy although it passed her share, passed it to the assignees *sub modo*, viz. provided they received the share *or its value* during the marriage, &c." Shortly after, the learned writer adds, "the court of Chancery in analogy to the rule of law decreed, that as neither the husband nor his assignees had, during his life, reduced the wife's share into possession *by sale or otherwise*, it necessarily survived to her upon his death." Here we must presume that the learned writer did not intend to state a fact, but merely *his conclusion* respecting it. For in the first place, there is not a syllable in the judgment expressive of an opinion as to what would be the effect of a sale of the wife's chose in action *by the assignees*. On the contrary, the Master of the Rolls expressly confined himself to the consideration of the effect of the assignment by operation of law in bankruptcy. He noticed cursorily the alleged effect of a sale by the husband himself in terms (such as "it is said," "supposing this doctrine to be established," "if such be the rule,") implying, that he regarded the doctrine merely as an assumption, and as having nothing to do with the question before him. In the next place, Mr. Roper thus explains in a subsequent passage[1] his statement of this judgment:—"Sir William Grant's observation, that the wife's property being a chose in action, and not reduced into possession during the husband's, life survived to the wife, must, *it is presumed*, be considered in an extensive sense, importing that the assignees having neither reduced the property into their possession, nor *disposed* of it for value, in life-time of the husband, &c." "This interpretation of the expression of the Master of the Rolls," Mr. Roper says, is founded upon the husband's legal power over his wife's personal estate, whereby his assignment of her real chattels, whether in possession or remainder, intercepts at law her title by survivorship. The fallacy of the notion, that the courts of equity would, in deciding against the wife's claim by survivorship in the case of assignment of her choses in action, observe an analogy to the husband's legal power of assigning, with or

[1] 1 Husb. & Wife, 231.

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without consideration, his wife's chattels real, or chattels personal in possession, has been sufficiently exposed in the case of Purdew v. Jackson before cited, where it was much pressed upon the court. It is moreover worthy of note, that in this very judgment of Mitford v. Mitford, the following observations of Sir William Grant seem designed to shew the wide distinction between the cases. "As at law her *choses in action* not reduced into possession by the husband, survive to her, so do her equitable interests in the same case survive to her in equity. *But there are some legal interests which do not admit or stand in need of being reduced into possession;* being in possession already, and not lying in action; as terms for years, and other chattels real, of which the legal title is in the wife. They will survive if no act is done by him; but he may assign them, which passes the legal interest, whether with or without consideration: the analogy is followed in equity. Equitable interests *of the same nature* may be transferred in the same manner." It seems obvious, that as to such legal interests of the wife as do not lie "in possession," (in other words, choses in action), the true line of proceeding in equity, in analogy to the courts of law, is to decide that the assignment of them by the husband, whether with or without consideration, shall not affect the right of the wife surviving. The assumption of Mr. Roper, above noticed, as to the effect of the judgment in Mitford v. Mitford, might not in itself be important, did he not appear mainly to rest upon it (not citing any other authority) his statement of the doctrine we are considering. "If then such assignees (in bankruptcy) are able by their assignment for value to bar the wife's title by survivorship to her own reversionary choses in action, for the reasons before given, it follows, that *an assignee of the husband for a valuable consideration* of the wife's choses in action, whether they be immediately recoverable, or be in remainder, &c., *will* also *be entitled to hold them against the wife's claim by survivorship.*"[1] When we find so important a statement resting upon such grounds, it is but proper to warn the student of the possibility of being misled, even by so respectable a text writer as Mr. Roper.

On the other hand, in favour of the wife's claim by survivor-

[1] 1 Husb. & Wife, 238.

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ship, there are many dicta which, taken abstractedly, seem to go the whole length of the proposition here contended for. As however, in truth, it may be doubted whether they were not intended to apply principally to the wife's equitable property, respecting which, the doctrines of the courts of equity have in some points been till lately very unsettled, the bringing of them into this discussion would only increase the great amount of unfair reasoning which has been applied to this subject. In the case, however, of Burnet v. Kinaston,[1] referred to by Sir William Grant, is a dictum of the lord keeper Wright, strictly in point. It was explicitly laid down by that judge, that "If a husband assigns *a bond* of his wife *for valuable consideration*, this assignment will not bind the wife if she survives."

Seeing, therefore, that the wife surviving, has by the common law of England (and not by the authority of the court of Chancery), an absolute right to such part of her personal property, of a legal quality, as at the time of her husband's death remains "in action;" and that no case is to be found in which a court of equity has deprived her of such property; it remains to be seen, what "equitable" grounds have been alleged for establishing against her the claim of the assignee. We are told, that "the property is altered."[2] If the expression is meant to be applied to *the transfer of the husband's interest* to the assignee, its correctness cannot be denied. Undoubtedly, all that the husband has to transfer passes by the assignment. But this argument goes too far; for (as was observed by Sir Thomas Plumer[3]), "in bankruptcy also the property is changed, every thing being transferred to the assignees which the bankrupt himself could lawfully part with." Yet it is quite settled, that the wife's claim is not thereby affected. "The property" (in this sense of the word) which the husband has, is a right to reduce the thing into possession during his life. What more a purchaser can take by the transfer is inconceivable, for how can an absolute right to any thing pass, by an assignment of any description, out of one who had in himself but a limited and defeasible interest? "If," said Sir William Grant, in Morley v. Wright,[4] "the husband has but the right of reducing the wife's interest into possession,

[1] Prec. Chan. 118. 2 Vern. 402.
[2] 1 Russell, 38.
[3] Ib. 27.
[4] 11 Ves. 17.

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how can he for valuable consideration, or otherwise, convey more than he has? If he does not reduce it into possession, it clearly survives. If then he parts with it for valuable consideration, and the assignee acquires a right different from that which the husband had, he parts with something different from what he has." If, on the other hand, by "the property" it is meant that the subject-matter is altered, what ground is there for such an assertion? It is as much "in action," and therefore as much within the application of the rule of law, after the assignment as before. An action is as necessary on the part of the assignee as on that of the husband, with this difference, that though the husband might have sued for the recovery of it in his own name only, the assignee would have to employ the name of the wife to obtain possession of that property, the unqualified right to which would by law have become vested in her.

What then are the extraordinary claims of the party in whose favor the widow is to be made the passive instrument of her own deprivation, perhaps ruin? He is one who buys a right of action; well aware of the chance of the husband's dying in the lifetime of the wife, and before the chose in action is reduced into possession; and who is *bound to know of the wife's legal right by survivorship!* Is this a case calling for the *interposition* of the court of chancery? Should a man be so ill advised as to purchase land entailed of the tenant in tail, without taking care to have the entail barred before payment of his purchase money, equity would not compel the issue in tail to vest the inheritance in the purchaser. So (to come nearer to the point) "in equity no agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution."[1] There seems no reason for contending, that the purchaser of the wife's property, would in the one case any more than in the other, have that given to him by a court of equity, which he knew at the time of entering into the contract for purchase, it was not competent to the vendor to convey to him. The right to the chose in action vests as clearly in the wife in the one case, as her right to the inheritance in the other; and if there be any truth in the professions of the courts of equity, that a married

[1] Tr. Eq. b 1. c. 4. s. 23.

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woman is an object of their peculiar consideration, the difference in the nature of the property in question cannot afford a ground for an opposite line of conduct in the two cases. It would surely be as inconsistent with the principles of a court of equity as it certainly would be contrary to a clear legal principle, to deprive the widow of her property, in order to make good the speculation (for it is no more) of a dealer in suits at law.

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WHETHER PAYMENT OF PURCHASE MONEY WILL TAKE A PAROL AGREEMENT FOR THE SALE OF LANDS OUT OF THE STATUTE OF FRAUDS.

FREQUENTLY as this most important point has occurred, the courts of equity (strange to say) have left it in an extremely unsettled state; and as it has not yet received the attention it deserves, either from text-writers, or the great judges who have occasionally touched on it, we propose to give it a brief discussion, and shall endeavour to elicit the principles on which it rests.

We shall begin with observing that the question, in our opinion, depends entirely on the statute of frauds, and that the doctrines of equity, with respect to it, before that statute, are immaterial. This position, though seemingly obvious, we shall endeavour to establish, as one of the most popular of professional authors[1] enters upon the subject with a different impression. Mr. Sugden commences his examination of the doctrine with the four cases in Tothill,[2] which arose previously to the statute, and which, he remarks, appear to be applicable to the point under consideration; as equity, even before the statute, would not execute a mere parol agreement not in part performed. But whoever scrutinises the cases to which that gentlemen refers, will, we think, be convinced that they do not support his proposition; and the firm

[1] Sugd. Vend. 107.

[2] William *v.* Nevil, Tothill 135. Ferne *v.* Bullock, ibid. 206. Clarke *v.* Hackwell, ibid. 228. Millar *v.* Blandist, ibid. 85.

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and positive language in which it is stated, forms a singular contrast to the manner in which he gives their specific results.

In two of them (Ferne v. Bullock, and Clarke v. Hackwell) "parol agreements were," he says, "enforced, apparently on account of the payment of very trifling parts of the purchase money; but the particular circumstances of those cases do not appear." And he concludes this part of his inquiry with observing, that though the decisions are not easily reconcileable, yet "the result of them clearly is, that payment of a trifling part of the purchase money was not a part-performance of a parol agreement." We apprehend that Mr. Sugden has forgotten the simple principle on which the doctrine depended prior to the statute of frauds, and that a recurrence to it will solve the difficulties, and reconcile the apparent contradictions, of the cases he has quoted. Before the statute there was not (as Mr. Sugden has imagined) any substantive *rule* in the courts of equity, that they would not execute a parol agreement, not in part performed. On *principle* a parol agreement, *if proved*, would have clearly bound the parties; but such an agreement was *difficult of proof*, and therefore the courts naturally *leaned against it*, except when it was fortified by concomitant circumstances of an unambiguous complexion. Of these circumstances, the part performance of the agreement, by the payment of the whole or any part of the purchase money, was one of the most decisive; but still it was important only as raising a presumption, and might consequently have been repelled by others of an opposite tendency. When, however, but a trifling sum was paid, the act was more equivocal, and therefore more controllable by positive evidence or accompanying facts. This explanation coincides with the true rule, which in a book of authority is expressed to be, that "the court *was very cautious* of relieving bare parol agreements for lands, not signed by the parties, nor any money paid."[1]

We now come to the statute itself (29 Car. 2. c. 3.) which declares generally, that no contract relating to lands shall be binding, *if not in writing*. The student who has been taught in elementary text-books, that the power of parliament is transcendant, and its enactments equally binding on all our

[1] Treatise of Equity, B. 1. c. 3. s. 8.

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courts of judicature, will be not a little surprised to find that equity continued, in some cases, to act as if this statute had no existence.[1] In the first case, indeed, subsequent to the statute, we find it laid down that a contract [parol] for land, and *a great part* of the money paid, is void.[2] And this case appears to have been generally[3] acted on, until the time of Lord Hardwicke, who laid it down broadly, that paying money had always been considered as a part performance;[4] a dictum which, taken in its full extent, would *virtually* sweep away the line of demarcation between the ancient and modern doctrines of equity on this subject, and almost render the above enactment a dead letter. We *afterwards* find the distinction taken between the payment of a *considerable* and an *inconsiderable* part of the purchase-money;[5] but this distinction, if in other respects sound, would be rendered unsatisfactory from the vagueness of the word *considerable*, and the consequent necessity of taking the opinion of the Court on every case that arises until some definite proportion is fixed.[6] Finally comes a decision by Lord Redesdale, *holding clearly, that payment of purchase-money is not a part performance, and had never been deemed so.*[7] That the *assertion* with which this proposition is accompanied, is ill-considered, is evident from the authorities which have been referred to in the brief deduction; but the *decision* we conceive to be right in its fullest latitude, and we unite with Mr. Sugden[8] in hoping that it will set the point at rest. The unsettled state of this doctrine strikingly exemplifies the evils which courts of equity produce when they aim at too much. In the

[1] It is not quite unusual for courts of equity to set their veto on acts of parliament, and render the passing of them totally nugatory. They exercised this *constitutional* prerogative in the instance of the statute which required two witnesses form will of money in the funds, 35 G. 3. c. 14. s. 16.

[2] Freem. 486. pl. 664 b.

[3] The doctrine of this case *seems* to have prevailed in Leak *v.* Morrice, 2 Cha. Ca. 135. 1 Dick. 14, 5. to have been rejected in the subsequent case of Alsop v. Patten, 1 Vern. 472. and to have revived in the still later cases of Seagood v. Meale, Prec. Cha. 560. and Lord Fingall v. Ross, 2 Eq. Ca. Abr. 46. pl. 12.

[4] In Lacon v. Mertins, 3 Atk. 1.

[5] Main v. Melbourne, 4 Ves. J. 720.

[6] Mr. Sugden (Vend. 112. 7 Ed.) properly remarks, that the reasoning of Sir Wm. Grant in Butcher v. Butcher, 9 Ves. J. 382. is applicable to this point.

[7] Clinan v. Cooke, 1 Scho. & Lef. 22.

[8] Vend. 113.



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present instance the legislature has, in the most positive manner, required the agreement to be in writing. What course might we have expected the courts of equity to follow? What was, undoubtedly, anticipated by the legislature? That equity would, *under all circumstances, have held a parol agreement to be void.* This would have been to construe the statute in a mode which would have precluded frauds arising from the specific source at which the legislature aimed, viz. from agreements being by parol. But the courts of equity reasoned thus. The statute was passed to preclude frauds, and it would be to make it a medium of fraud, if we do not enforce parol agreements which have been partly performed. The answer to which is, that after an enactment expressly requiring every agreement for the sale of lands to be in writing, those who choose still to rely on agreements by parol, have no more to complain of in such agreements being regarded as actual nullities, than if they were to neglect any other positive declaration of the legislature.[1] We are glad to find that Lord Redesdale has viewed this subject in the same light. His lordship added, that "the great reason why part payment does not take parol agreement out of the statute, is, that the statute has said that in another case, viz. with respect to *goods*, it shall operate as a part performance. And the courts *have therefore considered* this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in case of goods, and was silent as to the case of lands, that they meant it should not bind in the case of lands." We trust that this decision, which is consonant to the true spirit of a wholesome statute, will be established, though failing, as we conceive it does, in that part of its premises to which we have above alluded. But though judicial determinations have, in an infinity of instances, grown into principles, and become irresistible authority, yet when founded on a *statute*, which may always be referred to, and the construction of which is open to the courts at all times, precedents are not

[1] It seems that no part performance takes a case out of the French enactment. "With us," said Mr. Brougham, in his late speech on the state of the law, "the things are so numerous which take transactions out of the statute of frauds, that the memorandum is only in a small proportion of cases required."—Colburn's Edition, p. 90. We agree with him, that as almost all men are able to write at the present day, its outlets should be stopped up.—Ibid.

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wanting to show that a series of *dicta* and decisions, however long, may be subverted, if considered to militate against its real meaning and policy. [1]

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## A BIOGRAPHICAL SKETCH OF MR. FEARNE, WITH SOME OBSERVATIONS ON HIS ESSAY ON CONTINGENT REMAINDERS, &c.

THE lives of men devoted to scientific or literary pursuits can rarely be chequered by that diversity of incident, which gives biography its principal charm. They are, however, scarcely less interesting on this account to those who are treading the same paths, and who, fixing their eyes on the useful or splendid results of intellectual labour, naturally contemplate, with nearly an equal pleasure, the means of their production.

Charles Fearne was the eldest son of — Fearne, Esquire, judge advocate of the admiralty, who presided at the trial of the unfortunate Byng, and who, on that remarkable occasion, and in the general course of his profession, was esteemed a very able and learned man. He gave his son Charles the first rudiments of education himself, and at a proper age sent him to Westminster School, where he was soon distinguished for classical and mathematical attainments. Being designed for the law, as soon as he had finished his education at this seminary, he was entered at the Inner Temple, but with no fixed resolution to become a barrister. His life had hitherto passed in making excursions from one branch of learning to another, in each of which he made very considerable advances, and might perhaps have succeeded in any. During this state of irresolution his father died.[2]

The interest with which our author is regarded, as the first who successfully digested and elucidated the most abstruse, multifarious, and obscure department of our law of real pro-

[1] It seems to have been on this principle that the House of Lords proceeded, when in the great case of Ffytche v. the Bishop of London, it determined (May 1783) that a general bond to resign at the patron's request was illegal.

[2] Chalmers's B. D. vol. xiv. 159.



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perty, will be much augmented when it is known that he was one of those who, in the commencement of their professional career, have had to struggle with the *res angusta domi*, and overleap "poverty's unconquerable bar." But the circumstance was far more honorable to him than to those who have merely surmounted the obstacle of poverty. This will be shown by the following fact, which (it has been justly remarked[1]) may be looked on as the blossom of that independence and generosity which distinguished him through life. His father, besides being at a great expense for his education, presented him on his entrance into the Temple with a few hundred pounds, to purchase chambers and books; yet generously overlooking these circumstances, left his fortune, which was inconsiderable, to be equally partitioned between our author and a younger brother and sister. The former, however, sensible how much the family property had been wasted on his account, nobly refused the advantage of the will, and gave up the whole residue to the other children. "My father" said he, "by taking such uncommon pains with my education, no doubt meant that it should be my whole dependence; and if that won't bring me through, a few hundred pounds will be a matter of no consequence."[2]

Those who know the absorbing nature of legal studies, when pushed to the extreme essential to success, or rather to eminence, will learn with surprise, that Mr. Fearne was not merely a general scholar, but "profoundly versed in mathematics, chemistry, and mechanics. He had obtained a patent for dyeing scarlet; and had solicited one for a preparation of porcelain. He had composed a treatise in the Greek language on the *Greek accent:* another on *the retreat of the ten thousand.*"[3]

The following circumstance, while it shews the versatility of his talents, and the variety of his pursuits, will evince from how low a situation he climbed to the eminence which he subsequently attained. A friend of the reminiscent (says Mr. Butler in his Reminiscences)[4] having communicated to an

[1] Percy Anecdotes, (Bar) 159.

[2] Chalm. XIV. 160. We are glad to say, that the brother and sister, who were equally amiable and delicate, were both of them afterwards happily settled.

[3] Butler's Rem. vol. i. 118. [4] Ibid.

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eminent gunsmith a project of a musket, of greater power and much less size than that in ordinary use, the gunsmith pointed out to him its defects, and observed, that "a Mr. Fearne, an obscure law-man, in Breames' Buildings, Chancery Lane, had invented a musket, which, although defective, was much nearer to the attainment of the object."

Great attainments are sometimes the fruit of plodding and habitual industry, which, being unaccompanied by native comprehensiveness of mind, not unfrequently loses the end in the means; but they are sometimes the result of that fervid thirst of knowledge, and love of honourable distinction, which distinguish superior minds; and it is then that they become objects of rational admiration. That Mr. Fearne belonged to the latter class, that it was an ardent temperament which carried him forward in the pursuit of information and professional character, will appear from the following fact, recorded by his friend Mr. Butler. He told that gentleman, that when he resolved to dedicate himself to the study of the law, he burned his profane library, and wept over its flames; and that the works which he most regretted, were *the Homilies of St. John Chrysostom to the People of Antioch, and the Comedies of Aristophanes.*[1] When men, remarkable for great attainments and love of literature, resolve to apply almost exclusively to a rugged, and, as they may deem it, a barren science, the sacrifice is always great; and if they are likewise ardent and sensitive, as Mr. Fearne appears to have been, it is keenly felt. His burning the compositions which he valued, may appear to vulgar minds simply an act of caprice or folly; but in the imposition of a painful, perhaps an unnecessary, restriction, those who are better acquainted with human nature, recognise that devotedness which indicates the energy of a concentrating mind, and the ardour of a generous ambition.

It was, however, a *misfortune* which first induced our author to revert to his original profession, with unremitting diligence. In his practice of experimental philosophy, he fancied that he had discovered the art of dyeing morocco leathers of particular colours, and after a new process.

[1] Butler's Rem., vol. i. 119.

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It appears, that the Maroquoniers in the Levant (who are called so from dressing the skin of this goat, named the Maroquin) keep a secret those ingredients which give their liquor its fine red. This secret, or what would answer equally well, Fearne thought he had found; and like most projectors, saw great profit in the discovery. It was his unlucky connection in this scheme with a needy and expensive partner, which opened his eyes to the fallacy of his hopes, and restored him to the law.[1]

He had not long been in chambers, when his habits of study, diligence, and sobriety, were observed; and the extremely able manner in which he arranged and abstracted an intricate set of papers for an eminent attorney in the Temple, first gave him business.[2] After, however, he had established his reputation, and could have commanded what business he pleased as a chamber counsel, he resolved not entirely to throw up his original pursuits, and accordingly contracted his practice within a compass just sufficient for his wants. The time which he denied to increase of business, he generally spent at his house at Hampstead, and devoted to experimental philosophy. He made some optical glasses on a new construction, which have been deemed improvements; formed a machine for transposing the keys in music; and gave many useful hints in the dyeing of cottons and other stuffs. These he called his dissipations;[3] and with some truth, as the frequent dereliction of his professional employments certainly obstructed his advancement, while his unintermitting application to study seriously impaired his health. His conduct, with respect to his philosophical experiments and mechanical inventions, evinced the elevation of his sentiments and generosity of his disposition; the first of them he freely communicated to men of similar pursuits; and the latter, when completed, he as liberally gave away to poor artists or dealers in those articles.

He was not, however, without less intellectual recreations. We have heard from a gentleman, acquainted with the habits of this singular man, that when he could quit the metropolis,

[1] Chalmer's B. D. xiv. 160.
[2] Ibid.
[3] Chalm. *ubi sup.*

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his favourite resort was the sea-coast, where he amused himself with his boat, and frequently remained till the calls of business became pressing. He would then at once shake off his indolence, vigourously apply himself to his papers, and despatch them with astonishing rapidity.

Dialectics appear to have been his favourite study, and after he became engaged in business, he delighted to apply his refined logic to legal topics. This is evinced by his arguments in the very singular cause of *the representatives of General Stanwix and his daughter;* in which a father and his daughter were cast away in the same vessel, and not a person on board was saved, and the question was, which should be presumed to have died first. This case, which seemed to mock every principle of judicial decision, was brought before the court of Chancery, in the year 1772,[1] and met with a singular discussion. In the arguments which Mr. Shadwell published in Mr. Fearne's posthumous works, it was (that gentleman tells us) our author's intention to try what could be advanced on it with some appearance of reason. But he was not actuated by a parade of logical ingenuity. The compositions adverted to were never shown by the author but to a few select friends. They were merely a work of amusement.[2]

Mr. Fearne's general indifference to pecuniary emolument, the absorption of his time by scientific pursuits, and (we believe) the failure of some mechanical speculation which his philosophical discoveries had induced him to form, clouded the evening of his days. Like Lord Bacon, and from a similar cause (in part), he died poor.[2] The profession, however, were gainers by that event, as but for it they would probably have never been presented with his valuable *posthuma*, which were published by Mr. Shadwell for the benefit of Mrs. Fearne.

The professional character of Mr. Fearne stands almost without a rival. His essay on the most abstruse doctrine of the law of real property, "Contingent Remainders and Executory Devises," is generally considered as a most beautiful

[1] Reported in 1 Bl. Rep. 640. [2] See 1 Mer. 308.

[2] January 21, 1784, ætat 45, worn out, it is said, in mind and body.

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combination of logical accuracy and profound legal learning.[1] And these are not its only merits. The style of it, which is peculiar, not to say original, has not merely perspicuity and exactness, but much vivacity and elegance; and the complete success it met with, is a striking proof how effectively subservient literature and science may be to the illustration of the most abstruse departments of our law. The last edition of this work, by Mr. Butler, is not, in our opinion, altogether worthy of his great abilities. The repetition of the propositions of the text at the bottom of the page, almost *totidem verbis*, answers no useful purpose; and there are, we think, some glaring inaccuracies in his numerical analysis.

The logical groundwork of the Essay on Contingent Remainders, even to the definition and primary classification of the topics, we must, however, presume to question. We cannot but think that its author was somewhat hasty in the assumption of his premises. For example, he defines a contingent remainder to be "a remainder limited so as to depend on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate." But a little reflection will show that this definition does not comprise *remainders contingent merely on account of the person*;—as in a limitation to two for life, remainder to the survivor of them; where there is *no* contingent *event* or *condition*, but a present capacity in the remainder to take effect in possession whenever the particular estate determines by the death of the first of them. We would accordingly define a contingent remainder to be a remainder which is limited to a person who is not ascertainable at the time of the limitation, or which is referred for its vesting or taking effect in interest, to an event which may not happen till after the determination of the particular estate. We shall also presume to attack Mr. Fearne's classification; and our objections are two-fold. First, that as it comprises that class of remainders, which are contingent *only on account of the person*, it does not fall within his own defini-

[1] Not being a professional man (observes the late Doctor Parr, in a letter to Mr. Butler, vol. ii. of that gentleman's Reminiscences,) I was continually foiled by the Essay on Contingent Remainders. But I saw enough to convince me that his powers of reasoning were gigantic.

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tion, from which it is professedly deduced; that definition (as has above been shown) applying only to remainders contingent on account of the event. Secondly, that it is totally arbitrary, as it assumes, without a shadow of proof, that a difference in the events on which contingent remainders depend, makes a difference in the remainders themselves. The reverse of this we affirm to be open to strict and clear demonstration. If A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over to D. in fee, (which is an instance of Mr. Fearne's first sort of contingent remainders); if lands be given to A. in tail, and if B. come to Westminster Hall on such a day, to B. in fee (which exemplifies his second sort of contingent remainders); if a lease be made to J. S., and after the death of J. D. the lands to remain to J. W. in fee (which illustrates his third sort); it is very certain that the remainders of D. B. and J. W. are not in the slightest degree distinguished by the law; for *the nature of the event does not affect the qualities of the remainder.* We therefore reject this classification, and form another on what (as we think) is its only rational basis, viz. a *difference in the qualities of the contingent remainders.*[1] Hence our division would be four-fold. The primary one would be into such remainders as are contingent on account of the event, and such as are contingent on account of the person; because these *differ* in some of their *qualities,* a contingent remainder being devisable when the *event only* is *uncertain,* but *not* when the *person* is *unascertained.* [This was decided by the cases of Roe v. Jones, 1 Hen. Bl. 30. Moor v. Hawkins, 1 H. Bl. Rep. 33. and Jones v. Perry in error, 3. T. Rep. 88.] Our secondary division of contingent remainders would be into those which are at common law, and those which are by devise or by way of use; and this we derive from the *difference* between contingent limitations in common law conveyances, and limitations in wills and conveyances to uses; the *former* kind, when vehicles of the fee, putting it in abeyance, and the *latter* not.

This is not so much an aggression on the legal reputation

[1] Is it not in any science absurd to adopt any other criterion of identity and diversity than this?

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as on the logical merit of this far-famed essay. After what has been said, we leave the reader to his own opinion of the justness of our criticism.

One of the most singular misapplications of Mr. Fearne's reasoning powers was in his reading on the statute of enrolments. His object there was to prove that a grant of a remainder or reversion, for a pecuniary consideration, is at the present day a bargain and sale, and consequently void without enrolment. The sophistry of his arguments is now universally acknowledged. The grant of a remainder or reversion before the abolition of attornments was precisely analogous to a feoffment with livery of seisin. The pecuniary consideration *then* did not alter the operation of the deed, and make enrolment requisite; and the statute of 4 Ann. c. 16. s. 9. simply made a grant *without*, exactly what it was before *with*, attornment. See the very late case of Doe v. Cole, 1 Manning & Ryland, 33.

Mr. Fearne's fault, as a legal writer, was, we conceive, a want of that patient spirit of analysis and research, which can alone be depended on for laying well-founded premises; though we by no means intend to say that he was wholly deficient in this spirit, or did not occasionally, and, as it were, by fits and starts, possess it in an eminent degree. But he was certainly far from being what Lord Thurlow once styled him,[1] one of the most accurate of writers. His excellence consisted in accurate discrimination, in subtle ratiocination, in melting down the huge and shapeless masses of seemingly indigested and incongruous doctrines, and casting them into regular forms,—in detecting anomalies, and crushing them, when pernicious, with the combined and irresistible force of sarcasm, reason, and authority. Lord Mansfield had almost as much cause to dread Mr. Fearne on the legal, as his invisible enemy, Junius on the political, arena.[2] The celebrated case of Perrin v. Blake[3] illustrates this. His lordship (then chief justice) thought fit to deny with some indignation his having given as counsel an opinion which Mr. Fearne had ascribed to him on

[1] In Pering v. Phelips, 1 Ves. J. 256.

[2] Lord Mansfield, however, did not (as Dr. Parr and many others supposed) persecute Mr. Fearne. See Butler's Reminiscences, vol. ii.

[3] 4 Burr. 2579. 1 Bl. Rep. 672.

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the subject of the devise in that case, and which was at direct variance with his lordship's judicial determination. This circumstance properly induced Mr. Fearne to publish the opinion,[1] and to demonstrate its authenticity by shewing the source from which he got it; and the strain of irony in which he lamented that he should have been so fatally imposed on by appearances, would have done credit to the pen of Swift. This letter, with the opinions of Mr. Murray, and other eminent counsel, on the litigated will of W. Williams, was published with the fourth edition of the Essay on Contingent Remainders, but has been omitted from the subsequent editions.

Mr. Fearne, however, in his ironical attack on Lord Mansfield's decision in Perrin v. Blake, was not exactly consistent with himself. His ground of complaint was the desire of that great judge to break through those strict rules of law by which, whatever might be the intention of testators, limitations in wills assuming a certain form, produced a certain effect.[2] And this complaint was just, as without a doubt it is more desirable that property should be secured by firm and settled rules, than that the intention of testators should be effectuated. But if Lord Mansfield was on this ground culpable for setting his shoulder to the rule in Shelly's case, how much more so was Mr. Fearne himself for endeavouring,[3] on similar principles to those on which Lord Mansfield reasoned, and by arguments deduced from common sense, and abstract fitness, to subvert the maxim of the common law with respect to abeyance, confirmed as it is by a multitude of decisions, and, we believe, unshaken even by a judicial dictum. There is scarcely a remark of his on Lord Mansfield which does not apply with ten-fold force to himself.

[1] This appeared about 1780, and is said to have afforded Lord Mansfield some uneasiness, who, however, took no notice of it. Chalmers, vol. xiv. 162.

[2] See Cont. Rem. 165.

[3] Cont. Rem. 361.

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*The Court of Chancery. A Satirical Poem.* By REGINALD JAMES BLEWITT, late of Lincoln's Inn.

THE object of this book is to embody in immortal verse the reflections of the author on every thing connected with the Chancery. He gives his opinions with equal freedom on the nature of equity in general — the men, the manners, and the proceedings of the court — the personal qualities and private habits of judges, officers, and bar — and comments with equal harshness on the limited expenditure of Lord Eldon, the obesity of Master Stratford, and the country house of Mr. Agar. Those, therefore, who may happen to hear of the publication, are certainly justified in asking who Reginald James Blewitt, late of Lincoln's Inn, may be. We inquired accordingly, and have satisfied ourselves; though we must decline the task of satisfying our readers. We can merely permit ourselves to state, that he was once a practising solicitor; but whether he left his business or his business left him, we cannot venture to decide. He is, or lately was, residing in France, perhaps for his personal convenience, perhaps for the improvement of his property; both of which would very probably have been infringed upon had he been in England on the publication of his poem. It is a wretched attempt to versify abuse: dull prose, forced into couplets by transposing words, and tagging rhymes. "As a poet," says he, "I must throw myself upon the indulgence of the public."[1] We do assure him that the public will not receive him in that character, though at the same time quite ready to believe that he "has thrown into the work as much amusement as his poor abilities would furnish him with."[2] But our readers had better judge for themselves, and we studiously select the specimens, which are the best adapted to convey a notion of his style. Names at full length we cannot copy, and it is wrong perhaps even to venture on initials.

The following is Mr. B's opinion of one of the masters; a mild and gentlemanly comment, which would be quite clear and intelligible enough, if one could but make out, whether the gentleman alluded to is to be a bear or "a real ape."

[1] Preface. [2] Ibid.

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Lo! waddling forth; in dignity of mien,
Corporeal S———d from his haunt is seen.
That bloated form and pompous belly scan;
In shape and wit a very alderman!
Those vulgar looks his vulgar manners stamp,
For knowledge he ne'er burns the midnight lamp
The sternest brute will sometimes kindness own,
Bend as you will, and S——— yet will frown;
Enrag'd, he fain would kill you with a look,
Ye weak of skull, beware the flying book.
Hence to the rocky woods, thou growling bear,
Hence to the woods, and deal out justice there.
Hence to the woods; but 'ere thou dost escape,
Send to supply thy loss a real ape.
The suitors scarce will of their lot complain,
If by the change some intellect they gain.
Like thee, in gestures may his rage be dealt;
Like thee, the luckless volumes he may pelt;
Each art expressive of the monkey tribe,
Well hast thou learnt their natures to imbibe!—p. 18.

The next passage is part of a brilliant and occasionally pathetic appeal to Lord Lyndhurst, who doubtless will profit by the warning.

Be Lord High Chancellor, if so you must,
But oh! resign some portion of thy trust—
Its various duties more attention claim
Than one weak head can muster for the same.

Young Peer, be wise, and if you court success,
Outdo your senior by attempting less.
His failure served great talents to produce;
But what is intellect if not of use?
Well could he coin a doubt, or problem make—
But slow to solve, and there was his mistake.
His brains were sound; but little good they did.
Like some rich jewel in dark cavern hid.
Quick was his mind each error to perceive;—
Much craft had those who could that mind deceive—
A moment's thought would often shew a flaw,
Which those who look'd much deeper never saw.—p. 24, 25.

We next give an illustration of the author's mode of sketching the bar, whom he introduces with a most ingenious turn.

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Shake all the host together in a hat,
And take them singly forth, whose name is that?

H——t sallies forth—but why was he put there?
His judgeship merges all the barrister.
Long may he live that dignity to keep,
And slumber now, as once he lulled to sleep.
His name half serves my numbers to compose,
And turn dull poetry to duller prose.
Still might his long experience fit the place,
That Copley's sense without can never grace.—p. 51, 52.

* * * *

Another name? 'tis thine impetuous H——e
With fiery temper, and with looks of scorn.
But little read, or else of feeble brain,
That can but little at a time contain.
Prolix of speech, but course and unrefin'd,—
Thou hast no symptom of the cultur'd mind.
Thy words, like water roaring down a rock,
Astonish all, whose nerves can bear the shock;
Both rise in mists, and end at last in foam,
Thus savage nature feels with thee at home!
Far, far from me be eloquence so grand;
I like to hear, and hearing understand,
Not race thy tongue thro' all its barren track,
But stop my ears, for fear the drum should crack.—p. 57.

* * * *

Next R——e and B————th their names display;
The last sedate, the first perhaps too gay.
This in astuteness, that excels in sense,
Matur'd by thought, and labour more intense.
The one with head erect and measur'd stride,
The pink of glory, and the pearl of pride;—
Seems as ambitious of a taller form,
Or sick of herding with each brother worm.
That dormant eye and inexpressive cheek
But little promise in the other speak,—
In fact not much has either to admire,
Tho' each may hope to set the Thames on fire.
If little R—— can make the waters blaze,
Be mine the wonder, and be his the praise.
Should plodding B———— obtain the start,
His head is deeper than his looks impart.—p. 63, 64.

We are bound to say that he can praise occasionally; but few, we fancy, will wish for his commendation. Here, however, it is deservedly though most clumsily bestowed.

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From realms of darkness let us turn to light—
But where, if not to thee, ingenious K———?
An able draftsman, and a speaker bold,
By prudence guided, ne'er by fear controlled,
To clients faithful, not to foes unjust,
In better hands his suit could no one trust.
By honour urg'd, thou wilt not facts conceal,
But with strong argument their force repeal.
Thus truth is ever to thy speech attached,
Nor hopeless cause by blund'ring falsehood patch'd.
With whom can doubt on safer grounds advise?
Tho' young in years, so prematurely wise.—p. 67.

On that branch of the profession which he once pursued, six lines contain the substance of his thoughts, and are introduced as felicitously as usual.

But why thus hunt a subject off its legs?
I do but teach my grandam to suck eggs:—
An art attornies practice far too well,—
Yoke, white, their own—a client takes the shell.
What if he grumble, theirs has been the toil,
With profit scarce to make the kettle boil.
A porter's lot would suit them better far;
No anxious cares his peaceful dream can mar;
While their reward for nightly want of ease,
Just adds a pint of ale to bread and cheese.

Conveyancers might well feel hurt, were they to suspect themselves of being neglected by an individual so discriminating as Mr. B.; and we are glad, therefore, to be able to declare, that he brings them in with particular distinction, with an image which a Spenser might have envied; and minutely analyses the most distinguished of their class.

See from the dust a novel creature spring,
The serpent's nature with an eagle's wing!
With tooth so sharp, and pow'r to soar as high
Thro' all the pathless realms of sophistry!
Conveyancer! so call'd, because his art
Can change and motion to estates impart!—p. 74.

* * * *

But these have had their day; and P——— now
Assumes the sway with dictatorial brow.
And who is he? from whence? and what his claim
To be inscrib'd upon the rolls of fame?

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**In Devon born, he duly serv'd his time,**
**That long five years' apprenticeship to crime—**
**Which at the desk he spent without a bribe,—**
**The ready copyist, and the unsullen scribe.**
**From Shepherd's Touchstone next he drew a source**
**Of knowledge useful for his future course;**
**Thence did he learn each deed with curious eye,**
**To scan by practice of anatomy:—**
**As surgeons carefully dissect the heart,**
**To gain experience of each inward part.**
**Thus plodding on, while greater talents slept,**
**He and his doctrines into notice crept.**
**But novelty is past; and, like the worm,**
**That, for a time, has ta'en some brighter form,**
**Turns to the grub again, when life is gone;—**
**So P———'s glory into air hath flown.**
**See in his chamber, where yon mirror hangs!**
**'Tis there he studies for his court harangues:**
**Harangues, whereby he seldom gains a cause,**
**Yet never fails to win his own applause.**—p. 77, 78.

And this forsooth is the writer who begs pardon "as a poet;" who gravely tells his readers, that "his principal objects have been truth and consistency; and presumes to assert, that he has always been honest in commendation, and never severe without reason."[1] Consistent undoubtedly he is; there, at least, his book will not dishonour him; it is quite in keeping with itself, and we know nothing in modern literature to match it, except perhaps the Puffiad. As there are no symptoms of a second edition, we hope and trust that it has failed in one object at least, the recruiting the finances of the author; but were ten thousand copies at this moment circulating, our opinion of its merits would be the same. The dullness of calumny is in some sort redeemable by venom: libels are caught at, though wholly destitute of cleverness; and we no more admire the man who shows up our acquaintance or contemporaries, though some amongst us may be amused by the attempt, than we should admire a scavenger who was pelting the same persons with dirt, though very possibly we should stop to laugh at them.

[1] Preface.

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## LORD LANSDOWNE'S ACT.

*Substance of "An Act for consolidating and amending the Statutes in England relative to Offences against the Person," now under consideration of Parliament.*

WHEN the proposed bill shall have passed into a law, and our criminal code become somewhat more settled than it recently has been, we shall endeavour to take a comprehensive view of this branch of jurisprudence. For the present we shall keep to the act before us, on which our readers may be anxious for information; and, although it has not as yet received the final touches of the legislature, the material parts may be looked upon as fixed.

The laws which owe their existence, or rather, we should say, their existence in their new and comprehensive shape, to Mr. Peel, relate principally to offences against the property of individuals, and to the administration of the criminal law generally; the law introduced by Lord Lansdowne relates to offences against the person.

The first section repeals the whole or parts of between fifty and sixty acts of parliament, passed at different periods, from the 9 Hen. 3. c. 26. to the 3 Geo. 4. c. 114. Of the various and complicated changes which these had severally introduced on the antecedent state of the law, we may perhaps have occasion to speak in a future number; for the present, we will proceed to the second section, which blots the crime of petit-treason from our statute-book. Petit treason was either where a servant killed his master, a wife her husband, or an ecclesiastical person, secular or regular, his superior to whom he owed faith or obedience. The last of these three cases is evidently a relic of Popish superstition, or church-policy; the two former instances, the second more especially, have been distinguished in almost all ages and countries from the ordinary crime of murder.

With regard to the different kinds of criminal homicide, murder, and manslaughter, the law is left pretty much in the same state that it was before; one or two alterations, which



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will be found convenient in practice, have been introduced. The 33 Hen. 8. c. 23., which was extended to accessaries before the fact by 43 Geo. 3. c. 113. s. 6., provided that a subject of the king, who committed murder in a foreign state, might be tried in any county which the king should appoint; but in this case an examination of the accused party must first have taken place before the king's council, or three of them: it is now provided, " that if any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessary before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the united kingdom, whether within the king's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place as shall be appointed by the Lord Chancellor, or Lord Keeper, or Lords Commissioners, of the great seal, for the speedy trial of such offender." The trial is to take place in the usual way, by a jury of the county; and persons entitled to the privilege of peerage are to be dealt with as heretofore. The provisions of 2 Geo. 2. c. 21. whereby a person might be tried for murder, in cases where the death, or the cause of death only, happened in England, in the county or place in England where the death, or cause of death respectively happened, is by the eighth section of the present act, extended to manslaughter also. The crime of accessary after the fact to murder, instead of being a capital felony with benefit of clergy as heretofore, will now be punishable by transportation for life or imprisonment, with or without hard labour, for any term not exceeding four years.

The late very aggravated case, in which one Howard attempted murder by means of a blunt weapon, has induced the legislature to extend the principle of Lord Ellenborough's act far beyond its original limits, and, as we think,

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beyond what public expediency, and the rules of justice can warrant. The case alluded to could not be dealt with as a capital offence, monstrous as were the circumstances under which it was committed, because Lord Ellenborough's act, 43 Geo. 3. c. 58. s. 1. includes only cases of shooting or attempting to shoot, and stabbing or cutting, the latter of which can be applied only to sharp weapons; that it would be expedient to bring such cases as that of Howard's within the operation of the statute, we do not hesitate to say, but we think the remedy, as at present proposed, is worse than the disease.

Two sections of the present act are substituted for that part of Lord Ellenborough's act which related to the offences of stabbing, cutting, shooting, &c. with intent to murder, maim, disfigure, or disable any person, or with intent to resist or prevent the lawful apprehension of the party himself, or any of his accomplices; as the shape in which these sections are put is very different from the provisions of Lord Ellenborough's act, it may be better to give them at length: the first of these sections, which in the bill as it at present stands, is the eleventh[1] section of the statute, is as follows:—"Be it enacted, that if any person unlawfully and maliciously shall administer, or *attempt* to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously *attempt to drown or strangle any person*, or shall unlawfully and maliciously shoot at any person, or shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person; or shall unlawfully and maliciously stab, cut, or *wound* any person, with intent in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." On comparing this section with Lord Ellenborough's act, it will be found that attempts to administer poison, to drown or strangle, and wounding with intent to murder, are entirely new. The twelfth section is as follows: "And be it enacted,

[1] It should be observed that, as the intended law is at present only in the shape of a bill, the sections are not yet numbered; we, therefore, can only refer to the clauses as at present divided.



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that if any person unlawfully and maliciously shall shoot at any person, or shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, with intent in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof shall suffer death as a felon." The statute proceeds to enact, that if it shall appear on the trial that the offence was committed under such circumstances, that if death had ensued, the crime would not in law have amounted to murder, the defendant shall be acquitted of felony. The word "wound," it is apprehended, will include weapons of all descriptions, whether sharp or not, and should that be the case, and this statute acted upon to the letter, the consequences will indeed be fearful: for every aggravated assault on a constable, where, as not unfrequently happens in alehouse-squabbles, the man of authority gets a broken head, will become not only a felony, but a capital felony, nay, not only a capital felony in the person actually inflicting the blow, but in all present aiding and abetting the resistance or prevention of his lawful apprehension. In cases where several persons are indicted for assaults on a constable, it generally happens that one or two only actually struck the prosecutor, but that the rest were present joining in the affray; and it is very often a difficult matter for the jury to decide, when a great number of persons have been assembled together, whether some of those who are indicted were actually engaged in resisting the constable, or merely lookers-on enjoying the row, or even taking the constable's part: this has always afforded a fair opportunity for a spiteful neighbour, and it may be added too, for an ill-natured justice of the peace, who wish for an opportunity to bring their victim within the clutches of the law, to promote (not to use a harsher expression) the conviction of an innocent man; and there can be no doubt that imprisonment is fre-

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quently awarded to those who have had no share in the breach of the peace; but hereafter, under the present statute, should blood be drawn, an indictment containing four or five counts, gravely stating that A. B., the principal offender, with a certain weapon, to wit, an iron poker of the value of sixpence (seized perhaps from the pot-house hearth), inflicted severe wounds of the length of two inches, and depth of half an inch, first with intent to murder, then to maim, then to disfigure and disable, and lastly with intent to resist and prevent the lawful apprehension of the said A. B.; and further stating, that C. D. and a dozen others were present counselling, aiding, abetting, comforting, assisting and maintaining the said A. B. the aforesaid felony to do and commit; on which indictment, if the jury are convinced that any of the persons were present, aiding or abetting the principal offender in resisting his lawful apprehension, they cannot conscientiously do otherwise than find such persons guilty of a crime which the law declares to be a capital felony. We think that in cases of this kind a line might be drawn between cases where there is express malice, and those where the law only implies malice; and that at least the jury might be enabled by their verdict to find all or any of the defendants guilty of a misdemeanor only, so as to bring them within the operation of a subsequent section of this act, which makes a person assaulting with intent to resist or prevent the lawful apprehension or detainer of the party assaulting, or of any other person, liable to imprisonment for two years, and fine.

A clause was inserted in the House of Lords, we believe, at the suggestion of Lord Tenterden, enabling the jury, on an indictment for an attempt to commit murder, except in cases of an attempt to poison, to find by their verdict that the principal by his own voluntary act desisted from carrying his purpose into full effect; in which case punishment of death should not be awarded, but the offender, his counsellors, aiders and abetters be deemed guilty of felony, and liable to imprisonment for not more than two years: this provision has been rejected by the House of Commons, and perhaps would be inconsistent with the severity of the section which we have last quoted; still however we think that some such encouragement might profitably be held out to the repentant murderer.

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Few people, perhaps, but those who have been actually conversant in cases of this description, would think that the murderer would of his own free will desist from the completion of his horrid task; but it not unfrequently forms a feature honourable, even in the enormity of crime, to human nature, that the murderer, appalled with horror at his own guilty purpose, suffers himself to be overcome by the kinder feelings of his nature, and leaves his work unfinished: this, no doubt, would occur more frequently were such encouragement held out to the offender; since, under the present system, the criminal finds safety in the most effectual completion of his purpose, whereas in the other case he might hope, by a timely repentance, to escape the extreme penalty of the law.

No observations need at present be offered on the following section, which relates to the offence of administering drugs with intent to procure the miscarriage of women quick, or not quick, with child, as it is a simple re-enactment of the first two sections of 43 Geo. 3. c. 58. in a more concise form. By the fourth section of the same statute it was provided, that where a mother was indicted for the murder of her bastard child, the jury, if they acquitted the prisoner of the murder, might find that she was delivered of a bastard child and endeavoured to conceal its birth, the punishment of which offence was imprisonment for any term not exceeding two years. By the present act a woman may be indicted for the murder, and if acquitted of the murder, still found guilty under the same indictment for the concealment, or may be indicted at once for the concealment as a substantive offence and punished as heretofore. There was certainly an absurdity in indicting a person for murder, when the prosecutor might be well satisfied, from the evidence within his own reach, that the child had never been born alive; it may be also observed that by the omission of the words "which, if born alive, would have been a bastard," married women may be indicted for the concealment of the birth of legitimate children, or found guilty thereof under an indictment for murder, whereas before a married woman, if acquitted of the murder, could not have been found guilty of the concealment.

With respect to bestiality, it will be quite sufficient to observe,

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that by the substitution of the word "animal" for "beast," it is presumed the commission of an unnatural crime with a bird, (one or two instances of which, it is believed, are known to have occurred) and also with a reptile or fish, if such should occur, will henceforth be a capital offence. A very important alteration has been introduced, with regard to the proof of the completion of sodomy, bestiality, and rape, the reasons for which are stated in the act itself: "And whereas upon trials for the crimes of buggery, and of rape, and of carnally abusing girls under the respective ages[1] hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of these several crimes; for remedy thereof, be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only." There can be no doubt that the inconvenience complained of in the act, was frequently felt, from the necessity of proving emission as well as penetration; in all cases, except in rape, it was scarcely possible in any instance to prove the emission, and not always in rape; but we think that the legislature, (unless hereafter that is to be considered rape, which was not so formerly, and that such is not the case we are persuaded from the fact, that only the difficulty of the proof is noticed) might in prudence have added that the criminal must be proved to have effected his purpose—for otherwise, what line can be drawn between rape and an assault with intent to commit a rape? If the man was either interrupted in the act, or voluntarily desisted, the offence was not complete, but he was merely guilty of an assault; and there can be no doubt that men, who make attempts on the virtue of women, hoping that they will yield without resorting to extreme violence, oftener than not, desist, on finding the impossibility of *forcing* the woman's consent. Of the expediency of inflicting the severest punishment on such offenders, we say nothing; but we cannot but think this unqualified dispensation of the proof of

[1] Ten and twelve, the former of which, under any circumstances, is a capital felony; the latter, though with the consent of the girl, a misdemeanor.

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emission, is somewhat ill-judged, if the same distinction, between rape and assault with intent to commit rape, is still to be adhered to. Under the old system, the smallest degree of penetration, coupled with proof of emission, constituted a rape, and it would have been a great improvement had proof of the smallest degree of penetration, when at the same time there was evidence that the man had completed his object, whether emission could be proved or not, been held sufficient for that purpose. It is a very easy matter for a woman to hash up a charge of rape, and a very difficult one to defeat such a charge, even when false; a woman by very intelligible advances, can invite a man to make an attempt on her virtue, and he, in hopes of acquiescence on her part, may enable the woman to swear to some trifling degree of penetration, and unless the old distinction shall still be adhered to in practice, may, actually against his own consent, be drawn into the commission of a capital felony by the very person that appears as his prosecutor.

Considerable alterations are introduced with regard to the forcible abduction of women, with a view to gain possession of their property. The statutes relating to this offence were 3 Hen. 7. c. 2., 39 Eliz. c. 9. and 1 Geo. 4. c. 115., under which, in order to make the offence complete, a marriage must have taken place, and both the abduction and the marriage must have been in England. By the present act, taking or detaining, from motives of lucre, any woman that has any interest, "whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is an heiress presumptive, or next of kin to any one having such interest," *with intent* to marry or defile her, or cause her to be married or defiled by any other person, will be felony, and punishable by transportation for life, or for any term not less than seven years, or by imprisonment, with or without hard labour, for any term not exceeding four years. The unlawful abduction of any girl under the age of sixteen from her parents, or temporary guardian, will subject the offender on conviction to suffer such punishment by fine or imprisonment, as the court shall award; the only alteration made is in the degree of punishment, and was called for by the late aggravated case of Rex v. Wakefield; the punishment under 4th & 5th

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Ph. & M. c. 8. s. 3. being only imprisonment for two years, or fine.

Stealing a child under ten years of age from its parent or guardian, which was made felony by 54 Geo. 3. c. 101. s. 1. is left precisely in the same state as before the passing of this act.

One or two very important alterations have been made with respect to bigamy: as the law formerly stood, a person whose consort had been abroad for seven years, though known to be living, might marry again with impunity, or if a divorce *a mensâ et thoro* only had taken place; the only exceptions under the present act are, where a person, being a subject of his Majesty, marries a second time, "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person, to be living within that time," or "who at the time of such second marriage shall have been divorced from the bond of the first marriage," or "where the former marriage shall have been declared void by the sentence of any court of competent jurisdiction, and every such offence may be dealt with, enquired of, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county."

The remainder of this statute relates principally to assaults on different persons, either privileged from their office, or to whom public policy makes it necessary to give special protection, and to convictions before magistrates, for offences mentioned in this act.

So far back as 50 Edw. 3. c. 5. (re-enacted by 1 R. 2. c. 15.) an act was passed, making a person who arrested a clergyman in a church or church-yard, while attending to divine service, liable to imprisonment and ransom at the king's will, and gree (that is to say, satisfaction) to the party arrested. It is obvious, that the object of these statutes was to deter persons from interfering with the decent and reverent performance of public religious duties; for it seems, that as a protection to the clergyman himself it was ineffectual, inasmuch as the arrest, if not made on a Sunday, was deemed good in law. [1]

[1] Wats. c. 34. 5 Burn. Just. *Public Worship.*

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Considering, however, that witnesses or other persons attending to give evidence, or otherwise connected with a cause in a court of law, are privileged from arrest, whilst going to, attending, and returning from court; it would seem, by the modified protection granted to persons engaged in the particular service of God, compared with that granted to those engaged in promoting the administration of justice, that disrespect rather than reverence is shewn to that holy service. We believe that very few instances, except indeed during the heat of the rebellion, of arrests attempted upon clergymen, while engaged in the performance of divine service, have occurred; that, under the proposed law, instances of this offence will be more frequent in future there can be no doubt. It is enacted, "That if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment by fine and imprisonment, or by both, as the court shall award." We are of opinion, that it would have been better to have made an arrest under such circumstances void, and to have allowed the party arrested to be brought up by *habeas corpus* and discharged; still, however, making an arrest in the actual performance of divine service a misdemeanor, and subject to the above-mentioned punishment, and at the same time giving the injured party his remedy by action for the false imprisonment, as in ordinary cases of privilege from arrest.

The statute 9 Anne, c. 16., making it a capital felony to assault and strike, or wound a privy councillor in the execution of his office is re-enacted, and in addition every person counselling, aiding and abetting such offender, is to be deemed guilty of felony, and liable to the same punishment.

The eleventh section of the 26th Geo. 2. c. 19. subjecting any person who shall assault a magistrate, officer or other person lawfully authorised, on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, of any goods wrecked, stranded, &c., to transportation for seven years, is simply re-enacted, with the alternative of imprisonment, with or without hard labour, for such term as the court shall award, instead of transportation.

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The next section, which in a very neat and concise form embodies, with some trifling addition, the clumsy provisions of 3 Geo. 4. c. 114.; and 1 & 2 Geo. 4. c. 88. s. 2., we shall quote at length. "And be it enacted, That where any person shall be charged with and convicted of any of the following offences as misdemeanors, that is to say, of any assault with intent to commit felony; of any assault upon any peace-officer, or revenue-officer, in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault commited in pursuance of any conspiracy to raise the rate of wages; in any such case the court may sentence the offender to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

We may notice, that the second section of the 33 Geo. 3. c. 67. subjecting any person who should assault a ship-carpenter, with intent to prevent him from working, to twelve months' imprisonment, and making the second offence felony, with transportation for fourteen or seven years, is repealed, and the offence made punishable, on summary conviction before two justices of the peace, with imprisonment and hard labour for any term not exceeding three calendar months.

We shall conclude this article by quoting three sections, which introduce a new and very important alteration in the administration of justice, with respect to assaults: and shall only remark, that it will be a great public benefit to banish from our courts of quarter sessions prosecutions for trifling assaults, in which the prosecutor is often as guilty as the defendant, though we cannot but think the price paid for that benefit is considerably more than it is worth, namely, in adding to the already exorbitant power exercised by justices of the peace: it is notorious that scarcely a fiftieth part of the assault cases, that come before magistrates in their private houses, was ever brought before the court; in many the quarrel

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was settled before the sessions; in others, the magistrate bound over the offender to keep the peace, and dismissed the complaint; and in those only where the intervention of a jury was absolutely requisite, or where the private resentment of the magistrate, or of an influential neighbour called for a public exposure, were the most extreme measures resorted to. As our object is to give information, and not criticism, we shall make no apology for the length of our extracts. "And whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided, under the limitations hereinafter mentioned; Be it therefore enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs (if ordered) the sum of five pounds, which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place, in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division, in which such parish, township, or place, shall be situate, whether the same shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, riding, or division, shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby; and if such fine as shall be awarded by the said justices, together with the costs (if ordered) shall not be paid, either immediately after the conviction or within such period as the said justices shall, at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, there to be imprisoned for any term, not exceeding two calendar months, unless such fine and costs be sooner paid; but if the justices, upon the hearing of any such case of assault or battery shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a

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certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

"And be it enacted, That if any person, against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

"Provided always, and be it enacted, That in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act; provided also, that nothing herein contained shall authorize any justices of the peace to hear and determine any complaint of assault or battery, which shall have been committed in asserting any title or claim to any goods or chattels, lands, tenements or hereditaments, or any interest therein or appertaining thereto."

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# DIGEST OF CASES.

The First (the common law) division of this Digest contains every case (except those which relate to real property) reported in each of the last numbers of the King's Bench and Common Pleas Reports—Barnewall and Creswell, Manning and Ryland, Bingham, Moore and Payne—with some MS. notes of recent decisions.

The Second (the real property) division includes every case referrible to that head, in the reports mentioned above, and with very few exceptions, all on the same subject, in the two last numbers of Russell, the last numbers of Simon and of Bligh; and the most important decisions of the Court of King's Bench in Ireland, from Batty's Reports.

The Third (the equity) division includes the cases in the last numbers of Russell, Simon, Young and Jarvis, and the most important of the decisions in the House of Lords, from Bligh.

The Fourth (the bankruptcy) division includes every case in the last number of Glynn and Jameson.

**For the sake of brevity we have adopted the abbreviations in general use; namely,**

| | | | |
|---|---|---|---|
| **B. & C.** | **Barnewall and Creswell.** | **Y. & J.** | **Younge and Jarvis.** |
| **M. & R.** | **Manning and Ryland.** | **G. & J.** | **Glynn and Jameson,** |
| **M. & P.** | **Moore and Payne.** | | **&c. &c.** |

## COMMON LAW.

### AGREEMENT.

**1. An agreement "that A. should give B. 100*l.* for a coach, by four bills of 25*l.* each, and that B. should have a claim upon the coach until the debt was duly paid," (which agreement was followed up by mutual delivery of the coach and the bills,) was held to operate as a mere personal licence from A. to B. untransferable to take the coach if the bills were not paid, and that, the coach having come to the hands of the administratrix of A., by operation of law, B. was**

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not justified in taking it on the ground of one of the bills not being paid.—*Hobbes* v. *Ball*, 7 B. & C. 421.

2. An action may be maintained for the non-performance of a contract for the sale of land which is found to be incumbered by an unsatisfied judgment, without a previous tender of a conveyance to the judgment creditor.—*Pearson* v. *Upwell*, MS. Easter Term, 1828.

ATTORNEY.

1. A party who intrusts papers to an attorney, with an intimation that she would pay him if she recovered a certain property, is not liable for the costs of an action of ejectment commenced and abandoned by him.—*Tabram* v. *Horn*, 1 M. & R. 228.
2. An attorney who has been a member of a joint stock company, cannot recover against two other members the costs of defending an action brought against them in that character subsequent to the dissolution of the company. — *Milburn* v. *Codd*, 1 M. & R. 238. S. C. 7 B. & C. 419.
3. An attorney employed by the assignees of an insolvent to bring an action, cannot recover his costs incurred therein, without proving either that it was brought with the consent of the creditors and approbation of a commissioner, or that he had apprised his client that such consent was necessary.—*Alison, Gent. &c.* v. *Rayner*, 7 B. & C. 441.
4. The property in copies, drafts, &c. paid for by a client, is in him, and not in the attorney.—*Ex-parte Horsfall*, 7 B. & C. 528.

AWARD.

It may be stipulated in a deed of submission that the authority of the arbitrators shall continue, notwithstanding the death or insolvency of either of the parties; and the surety on a bond conditioned for the due performance, in which bond the stipulation as to death, &c. was not inserted, is liable though the award was not made till after the death of the party for whom he was bound, and directed the executors to pay, &c. By the deed the award was to be made between ——— and the —— day of ——— next, or any other day the submission might be prorogated. Held that the omission of dates was immaterial, and that it was to be looked upon as a general authority to be exercised in a reasonable time.—*Macdougal* v. *Robertson*, 1 M. & P. 147. 4 Bing. 435.

BANKRUPT.

1. The assignees of a bankrupt cannot consider as a wrong doer a person interfering with the bankrupt's effects, after once treating such person as their agent.—*Brewer* v. *Sparrow*, 1 M. & R. 2. S. C. 7 B. & C. 310.
2. If a verdict in trover be obtained in vacation, and after the 1st day of the next term the defendant becomes bankrupt, and final judgment is signed subsequently, the plaintiff may prove the debt thereby created under the commission, and will be barred by the certificate.—*Greenway* v. *Fisher*, 7 B. & C. 436.

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BILL OF EXCHANGE.

A power of attorney "for me and on my behalf to pay and accept such bills as shall be drawn or charged on me by my agents or correspondents, as occasion shall require," authorises the acceptance of such bills only as are drawn on the individual account of the principal, and not bills drawn in respect of partnership transactions. A power to indorse and negociate bills of exchange, payable to the principal, and generally "to perform all other affairs and concerns of the principal," does not authorise the acceptance of bills.—*Attwood* v. *Munnings*, 1 M. & R. 66. S. C. 7 B. & C. 278.

2. Where the drawer of a bill draws upon himself, it is to be looked upon as a promissory note, and the drawer is not entitled to notice of non-acceptance. The similarity of name and residence is evidence sufficient to warrant the jury in supposing the drawer and drawee to be the same person.—*Roach* v. *Ostler*, 1 M. & R. 120.

3. The defendant had accepted a bill for the honour of A. the drawer, who indorsed it to his agent, the plaintiff, by whom it was paid away on the drawer's account for goods contracted for by him. This contract was afterwards rescinded, but the holder refused to re-deliver until repaid a demand upon a different account on the drawer. This the plaintiff promised to pay, received the bill, and sued the acceptor, but held that he could not recover even the amount for which he had thus rendered himself liable. — *Hallett* v. *Davis*, 1 M. & P. 79.

4. Bill of exchange payable 50 days *after sight* was presented for acceptance and refused, and duly protested eight days afterwards; it was accepted by a third person for the honour of the drawer, and at the expiration of 30 days from this acceptance, together with the days of grace, presented for payment both to the original drawees and the acceptor for honour; held that these presentments for payment were made at a proper time.— An acceptance for honour is not an absolute but a conditional acceptance, and therefore, held 2ndly, that an averment of presentment to the drawee for payment was necessary.— *Williams* v. *Germaine*, 7 B. & C. 468.

COMMON.

An unqualified custom for the lord of the manor to inclose the waste is bad. Secus, a custom to inclose leaving a sufficiency of common, but it is on the lord to shew that a sufficiency is left. Semble, that a custom so qualified is good even as against common of turbary. — A commoner may throw down *the whole* of a fence inclosing any part of the common, and even when erected by the lord wrongfully.—*Arlett* v. *Ellis*, 7 B. & C. 340.

CONVICTION.

A conviction under 52 G. 3. c. 93. for using a dog and gun without a certificate, is not removable by certiorari, without an affidavit that the place where the offence was committed was not within the district of the convicting magistrate.—*The King* v. *Long*, 1 M. & R. 139.

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CORPORATION.

Where in a charter of inauguration any power is given by a clause which enumerates the different component parts of the corporate body, the concurrence of a majority of each separate part is requisite, as for instance, when given to the mayor, aldermen, and capital burgesses. Secus, when given to the corporation collectively, and no distinction made between the different classes of which it consists.—*Rex* v. *Headly*, 7 B. & C. 496.

COSTS. See PRACTICE.

COVENANT.

Where a covenant goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is independent, and the plaintiff need not aver performance of covenants on his part. As where A. covenanted with B. not to carry on a particular trade, and B. in consideration thereof covenanted to pay an annuity; it was held, that a breach of A's covenant was no defence to an action brought by A. against B. for non-payment of the annuity.—*Carpenter* v. *Cresswell*, 1 M. & P. 66.

EJECTMENT.

1. In ejectment judgment having been given against the lessor of the plaintiff in C. P., which was reversed on error in K. B., the plaintiff in trespass for the expulsion and mesne profits may recover the costs of the reversal, though errror be pending in the Lords.—*Nowell* v. *Roake*, 1 M. & R. 176. S. C. 7 B. & C. 404.

   [N.B. The pendency of the writ of error in the Lords does not appear in the report in B. & C.]

2. Upon a demise for a certain period, with the privilege of using part of the premises after its expiration, ejectment may be maintained for the part of the premises to which the privilege does not extend immediately on the conclusion of the term.—*Doe dem. Waters* v. *Houghton*, 1 M. & R. 208.

3 When the person in possession is proved to have been presented simoniacally, the presentee of the crown, after institution and induction, may maintain ejectment and is not driven to a quare impedit; the church being void in law by the simony when he was inducted.—*Doe dem. Watson* v. *Fletcher*. MS. East. Term, 1828, in the King's Bench.

EVIDENCE.

1. Plaintiff and defendant held under the same landlord, the plaintiff by parol, the defendant by lease. The action was brought to try the property in a lane, and it was held, that the lease not being produced, the landlord's evidence was admissible to prove that he let the lane to both, and that the plaintiff therefore had no exclusive property therein.—*Noye* v. *Reed*, 1 M. & R. 63.

2. Payment of interest is evidence of the principal sum being due, in



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reference to which the interest was paid. A note given for a deposit may be read as evidence of the terms of the deposit, though void under the stamp act.—*Sutton* v. *Toomer*, 1 M. & R. 125. S. C. 7 B. & C. 416.

3. In debt on an award, the execution of the submission by all the parties must be proved as averred in the declaration, though one be a married woman.—*Ferrer* v. *Oven*, 1 M. & R. 222. S. C. 7 B. & C. 427.
4. Where a prior stamped agreement was varied by a subsequent one, unstamped, and there were counts on both together, and on each separately, although the latter agreement could not be read in evidence to support the plaintiff's case, yet the court took notice that it affected the validity of the former.—*Reede* v. *Deere*, 7 B. & C. 261.
5. Strips of waste on the sides of a highway are presumed to belong to the owner of the adjoining close. Where such owner is a copyholder the presumption is, that they are part of his tenement.—*Doe dem. Pring* v. *Pearsey*, 7 B. & C. 304.
6. The will produced was thirty years old; but the testator had died within that time. Held that the surviving witness need not be called. —An alteration in a man's circumstances is not to be presumed. And, therefore, where a man is proved to have been living a century ago, unmarried and childless, he may be presumed, in the absence of proof, to have lived and died so.—*Doe dem. Oldnall* v. *Wolley*, MS. Easter Term, 1828.

And see title BILL OF EXCHANGE, supra, (2).

## EXECUTION.

1. One who enters under an agreement for a lease, and pays the rent agreed upon, acquires such an interest as may be seised under a fi. fa.—*Doe dem. Westmoreland* v. *Smith*. 1 M. & R. 137.
2. Where assignees had, for several months, been in possession of the farm and stock of a bankrupt, and renewed part of the stock and brought in fresh of their own, and the sheriff under a fi. fa. at the suit of a judgment creditor of the bankrupt levied upon the whole, he was deemed a trespasser *primâ facie*, and not entitled to an indemnity.—*Bernasconi* v. *Fairbrother*, 7 B. & C. 379.

## FALSE IMPRISONMENT.

A magistrate is liable to an action of trespass and false imprisonment for ordering a constable to take out of the room a person accused of maliciously hurting the dog of another, and bring him back again if the parties could not settle the matter, that he might proceed to commit him, the matter being settled, and no conviction taking place. —*Budget* v. *Coney*, 1 M. & R. 211.

## HIGHWAY.

1. Justices are not liable to an action for a distress under a conviction for not performing statute work on the highways, if they have jurisdiction by reason of the plaintiff's occupying lands within the parish, although claiming an exemption. The proper course would have

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been to show the exemption before the magistrates, and appeal to the sessions. — *Fawcett v. Foulis*, 1 M. & R. 102. S. C. 7 B. & C. 394.

2. Under the highway act, a magistrate cannot present a road on the information of any other surveyor than the surveyor of the district in which the road lies. — *The King* v. *Inhabitants of Fylengdales*, 1 M. & R. 176. S. C. 7 B. & C. 438.

3. Where a landowner permitted a road to be made through his estate for the use of the public, as to all purposes except that of carrying coals, and after the expiration of a year from the opening of the road erected a bar, and stopped coal carts from passing. Held that this, if a dedication at all, was a partial one only, and that suffering the road to be repaired by the surveyor of the highways, at the expence of the parish, did not amount to an abandonment of the restriction. — *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257.

INCLOSURE.

If an inclosure act give the commissioners power to award land, in exchange for other land or for money paid, they may award land partly in exchange, and partly for money. — *Doe dem. Lord Suffield* v. *Preston*, 7 B. & C. 392.

INNKEEPER.

A traveller stopped at an inn in Nottingham, and directed part of his baggage to be placed in a certain room therein; the inkeeper's servant made no objection, but placed it there, whence it was afterwards stolen. The Chief Baron at Nottingham assizes held that the case of an innkeeper was analogous to that of a carrier, and that if he would limit his responsibility, he must give a special notice that he will not be liable if the baggage be disposed in any particular place or manner. On a motion for New Trial the Court of K. B. concurred with this opinion.—*Richmond* v. *Smith*, MS. Easter Term, 1828.

INSOLVENT.

1. The death of the insolvent between the assignment to the provisional assignee, and the assignment by him, does not affect the last. — *Willes* v. *Elliott*, 1 M. & P. 19.

2. A surety may arrest the grantor of an annuity for arrears become due subsequently to the discharge of the grantor under the insolvent act, and which the surety had been compelled to pay, though the grantee had provided the value of the annuity and the surety had received a dividend upon a sum which he had been compelled to pay before. — *Freeman* v. *Burgess*, 1 M. & P. 91.

INSURANCE.

1. Stranding, according to its legal signification, is, when a ship by accident is on the ground or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, and is injured thereby; and the underwriters are liable, though such stranding is occasioned by the negligence of the master or mariners. — *Bishop* v. *Pentland*, 7 B. & C. 219. S. C. 1 M. & R. 49.

2. Where a vessel, at the commencement of her voyage, was so damaged



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as to render it advisable to take out her cargo, and sell her, an abandonment of the freight is not necessary to make the underwriter liable on a policy for freight. *Mount* v. *Harrison*, 1 M. & P. 14.

LANDLORD AND TENANT.

Under a covenant to pay the taxes charged, or thereafter to be charged on premises, the value of which is subsequently increased by the erections of buildings with the landlord's consent, the landlord is liable only for the taxes calculated on the original value of the land at the time of the demise. — *Watson* v. *Home*, 1 M. & R. 191. S. C. 7 B. & C. 285.

LIBEL.

In an action for a libel the jury find that the libel imputed felony to the plaintiff, but that the defendant was not actuated by *express* malice, and gave a verdict for fifty pounds damages. This the court refused to disturb, though objected to, on the ground that the action was not maintainable without proof of malice. A communication as to the conduct of a preacher to a congregation about to elect to the ministry, reflecting severely on him, is privileged, if not unnecessarily repeated or circulated. — *Blackburn* v. *Blackburn*, 1 M. & P. 33.

LIEN.

The right of general lien, unless expressly contracted for, can result only from general and unbroken usage; if the point has been at all disputed, the right cannot be implied, though the claim has been admitted in a great majority of instances. — *Holderness* v. *Collinson*, 7 B. & C. 212. S. C. 1 M. & R. 55.

OVERSEER.

An overseer has not, by virtue of his office, any authority to borrow money. — *Leigh* v. *Taylor*, 7 B. & C. 491.

PARTNER.

A person is not liable for supplies furnished to a mine, unless he has held himself out as a partner in the adventure to the person by whom the credit was given, or is really a partner. And the payment of money for a share and receipt of a certificate, are not sufficient to confer a legal interest, a mine being looked upon as real property; nor is it conclusive evidence of such actual partnership that the defendant considered himself a proprietor, and made inquiries about the management as such. — *Vico* v. *Anson*, 1 M. & R. 113. S. C. 7 B. & C. 409.

PLEADING.

1. A count for money had and received by defendant as executor, cannot be joined with a count on an account stated with defendant as such. Quære whether a count for money paid for the defendant as executor, may be so joined. — *Ashby* v. *Ashby*, 1 M. & R. 180. S. C. 7 B. & C. 444.
2. In an indictment for obstructing a highway, an averment that the obstruction took place in the parish of S., opposite to a mill there, a highway there leading from S. to H. is a sufficient allegation t

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the highway is in the parish of S. — *The King* v. *Knight*, 1 M. & R. 217. S. C. 7 B. & C. 413.

3. A bill was specially intitled of the 20th of January, and then filed as of the preceding term. It was delivered on the same day, and the issue joined was, whether at the time of exhibiting the bill the plaintiff was administratrix. Administration was granted on a day in the vacation, anterior to the 20th of January. Held that the verdict was properly found in the affirmative.— *Wooldridge* v. *Bishop*, 7 B. & C. 409.

4. Where an agreement was in these words, " The plaintiff having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, promise to pay thirty pounds on account of the debt, on the first of April. Held, first, that it might be declared as an executory contract; 2ndly, that the consideration was sufficient, the agreement importing that the proceedings were, at least, to be stayed until the 1st of April. 3dly, that the naked averment that plaintiff did suspend proceedings was sufficient after verdict. — *Payne* v. *Wilson*, 7 B. & C. 423.

5. Declaration stated, that defendant " *contriving, &c., did print and publish of and concerning the plaintiff, a libel, containing the false, &c., matter following, that is to say.*" It then set out the libel, which neither was connected with the plaintiff by any inuendo, nor manifestly appeared to relate to him. Held bad, on error. — *Clement* v. *Fisher*, 7 B. & C. 459.

6 An indictment charged that A. B. on, &c., being the servant of J. H., *on the same day and year aforesaid*, &c. one ring, &c. then and there belonging to and in the possession of the said J. H. feloniously did steal. Held, that notwithstanding the introduction of the words *on the same day and year aforesaid*, the proper construction was, that A. B. was the servant of J. H. at the time of committing the theft. —*Rex* v. *Somerton*, 7 B. & C. 463.

7. The court, in an action of assumpsit, will not grant leave to plead several special pleas to the effect that the money was due only upon stockjobbing differences, as this might be proved under the general issue. *Rosset* v. *King*, 1 M. & P. 145.

8. The Court of King's Bench held that an action was rightly brought against the owner of a carriage and horses, which had been hired with servants to drive them, for a journey to Ascot Heath races, in respect of an injury done by that carriage in the course of the journey. Lord Tenterden, C. J. and Littledale, J. expressing their adherence to their opinions in Sougher v. Painter, 5 B. & C. 547.—*Smith* v. *Roberts*, MS. Easter Term, 1828.

## POOR RATE.

A canal company is liable to be rated in respect of the land which they occupy in every parish through which the canal passes, and for that value which the land there produces. Thus if the traffic on the canal is greater in one parish than another, the rate in that parish will be proportionably greater.—*The King v. Inhabitants of Kingswinford*, 7 B. & C. 236. S. C. 1 M. & R. 20.

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PRACTICE.

1. An Irish peer, who has voted at the election of representative peers, is privileged from arrest, and from being sued by *capias*. — *Coates* v. *Lord Hawarden*, 1 M & R. 110. S. C. 7 B. & C. 388.
2. A party under terms of taking short notice of trial for the sittings after a non-issuable term, cannot procure the venue to be changed from Middlesex or London to another county upon the common affidavit, it can be changed only upon special grounds. — *Gitton* v. *Randall*, 1 M. & R. 142.
3. An office copy of an affidavit on debt, on which a bill of Middlesex was issued, will authorise the issuing of a bailable latitat. *Baker* v. *Allan*, 1 M. & R. 232. S. C. 7 B. & C. 526.
4. By ruling the sheriff to bring in the body, plaintiff precludes himself from taking proceedings against the bail, until that rule has expired; and if, before that period, bail be put in and justified, it is sufficient, although more than four days after exception. *Whittle* v. *Oldaker*, 7 B. & C. 478.
5. When there is a judge's order for delivery of particulars of plaintiff's demand, and to stay proceedings in the mean time, the defendant cannot sign judgment of *non-pros* on account of the particulars not being delivered. His course is to obtain an order for their delivery within a given time, and if the plaintiff fail therein, judgment may then be regularly signed. *Burgess* v. *Swayne*, 7 B. & C. 485.
6. Where actual demand is essential to the perfecting of a cause of action, the affidavit of debt must allege it to have been made. — *Driver* v. *Hood*, 7 B. & C. 494.
7. Proceedings in a foreign attachment being removed by certiorari, bail in the superior court must be put in for all the defendants, or a procedendo will be granted. — *Keat* v. *Goldstein*, 7 B. & C. 525.
8. An affidavit entitled of the court of C. P., in the jurat of which, the person before whom it was sworn was not described as a commissioner, is insufficient, and the defect cannot be remedied by a supplementary affidavit. — *Howard* v. *Brown*, 1 M. & P. 22.
9. Where the plaintiff was named in the affidavit as C. E. G., and in the subsequent proceedings as C. G., omitting the second name, it was held that an exoneretur must be entered on the bail-piece; but that the defendant having omitted to apply in the first instance, and perfected bail, the proceedings could not be set aside for irregularity. — *Grindall* v. *Smith*, 1 M. & P. 24.
10. A *capias* being made returnable on a day certain, instead of on a general return day, the court refused to allow it to be amended, unless the plaintiff would consent to discharge the bail on defendant's entering a common appearance. — *Johnson* v. *Dobell*, 1 M. & P. 28.
11. A foreign master of a vessel, trading to this country, having no fixed residence here, cannot be required to give security for costs. The motion should be made before plea pleaded, unless upon an affidavit that the defendant was before ignorant of plaintiff's residing abroad. — *Kasten* v. *Plaw*, 1 M. & P. 30.
12. If a country cause be made a remanet, a new notice of trial is neces-

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sary, though not when made a remanet at the sittings in London or Middlesex. — *Gains* v. *Bilson*, 1 M. & P. 87.

13. A party outlawed can only appear in court for the purpose of reversing the outlawry. Thus, a grantor of an annuity, who has been outlawed in K. B. cannot apply to C. P. to set aside the securities whilst his outlawry continues. — *Loukes* v. *Holbech*, 1 M. & P. 126.

14. The defendants, in an action in which the plaintiff had been nonsuited, and had obtained a rule for new trial, gave a cognovit for one shilling damages, and costs to be taxed by the Prothonotary. The Prothonotary having refused to tax the costs of the nonsuit, the court refused to interfere. — *Elvin* v. *Drummond*, 1 M. & P. 88.

15. The defendant, an uncertificated bankrupt when the action was commenced, pleaded his bankruptcy and certificate *puis darrein* continuance, on which the plaintiff withdrew the record, and countermanded the notice of trial. The plaintiff being afterwards ruled to reply, obtained an order for time, but subsequently determined to proceed no farther, when the defendant signed judgment of *non-pros*, and issued execution for costs, but held that defendant was not entitled to the costs of proceedings prior to the plea, and the execution was accordingly set aside without costs. — *Baker* v. *Morrey*, 1 M. & P. 138.

16. On a motion by bail to set aside an attachment against a sheriff, it is necessary that the affidavit should state that it was made, not only without collusion with the principal, but at the expense of the bail. — *King* v. *Sheriff of London*, 1 M. & P. 177.

17. Costs are never given upon showing cause against a rule in the first instance. — *Rex* v. *Lacy*, 1 M. & R. 139.

18. The proceedings in a recovery cannot be amended by substituting one county for another. — *Dolling* v. *Rice*, 1 M. & P. 178.

19. Security for costs when plaintiff resides abroad cannot be moved for on the mere putting in of bail nor until after justification, if they have been excepted to. See De la Preuve v. Duc de Birs, 4 T. R. 697. — *Johnson* v. *Ely*, MS. Easter Term, 1828.

## PRESENTMENT.

If a high constable would present for a nuisance in a highway, he must go before the grand jury, and give his evidence upon oath. — *Rex* v. *the Bridgewater and Taunton Canal Company*, 7 B. & C. 514.

## SEDUCTION.

A married woman is competent to enter into an engagement of service, defeasible only by her husband; and a father may maintain an action for the seduction *per quod*, &c. of his married daughter, serving in his family apart from her husband. — *Harper* v. *Luffkin*, 1 M. & R. 166. S. C. 7 B. & C. 337.

## SETTLEMENT.

1. The mere fact of a pauper being first found in a particular parish, is not presumptive evidence of his having been born there nor does his having being maintained for several years and afterwards ccasion-

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ally relieved by such parish, amount to an admission of his being settled there, nor preclude the parish from disputing the point.—*The King* v. *the Inhabitants of Trowbridge*, 7 B. & C. 252. S. C. 1 M. & R. 7.

2. A pauper was hired as an ostler, upon an agreement that he was to have no wages, but merely what he got as ostler, and that the service might at any time be determined by either party; held that the latter stipulation precluded the presumption of its being a general hiring for a year, and that service under it did not confer a settlement.—*The King* v. *the Inhabitants of Great Bowden*, 7 B. & C. 249. S. C. 1 M. & R. 13.

3. A man marrying a woman who is tenant from year to year of premises under the annual value of 10*l.* gains a settlement thereby, whether her interest came to her as executrix or otherwise.—*The King* v. *Inhabitants of Ynyseynhanam*, 7 B. & C. 233. S. C. 1 M. & R. 16.

4. A pauper under age entered into a contract of service, and served under it till he had attained his majority, when he returned to his father's house; held that the pauper was not emancipated by such contract and service, and that his settlement followed that of his father, acquired during the continuance of the service.—*The King* v. *Inhabitants of Lykhet Matravers*, 7 B. & C. 226. S. C. 1 M. & R. 25.

5. A general hiring, with a stipulation that the servant might leave on giving a month's notice, and might be dismissed at pleasure, is a yearly hiring sufficient to confer a settlement, and it matters not though the hiring was by a public establishment, as a Royal Military College, exempt from poor rates.—*The King* v. *Inhabitants of Sandhurst*, 1 M. & R. 95.

SET-OFF.

The plaintiff having recovered damages against four defendants in trespass, three of whom were indemnified by the other, who had recovered against the present plaintiff in a former action; held that the damages and costs in the former action might be set off against the damages and costs in the present.—*Bourne* v. *Bennett and others*, 1 M. & P. 141.

SESSIONS.

The power given to the court of quarter sessions by the 3 Geo. 4. c. 46. to order the discharge of a forfeited recognizance, is confined to cases where the party has been committed or given security to appear; and the court does not possess a general discretion.—*Hayne* v. *Hayton*, 7 B. & C. 292.

SHERIFF.

If a warrant of attorney be executed by one who is inaccurately described therein, and judgment entered up and a fi. fa. issued against him by that description, the sheriff is bound to execute the fi. fa. and cannot dispute the accuracy of the description.—*Reeves* v. *Slater*, 7 B. & C. 486.

STAMPS.

1. An *ad valorem* stamp on the principal sum is sufficient for a bond

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conditioned for the payment of the principal sum, and interest for the performance of collateral acts, provided the *ad valorem* duty exceeds 1*l.* 15*s.* which would have been required by the collateral matter if it stood alone.—*Dearden* v. *Burns*, 1 M. & R. 130.

2. An agreement may be received as evidence of the tenancy without a fresh stamp, though altered by consent after execution, by the addition of the words "*house and premises*" to the word "*farm.*"—*Doe dem. Waters* v. *Houghton*, 1 M. & R. 208.

3. When a clause in a prior is incorporated by words of reference into a subsequent agreement, it is not annexed thereto, so as to make an additional stamp necessary on the ground of its swelling such subsequent agreement beyond 1080 words.—*Atwood* v. *Small*, 7 B.& C. 390.

4. Articles whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of £600 to perform the agreement; held that a stamp of 1*l.* 15*s.* was sufficient.—*Mounsey* v. *Stephens*, 7 B. & C. 403.

5. To prove a tenancy the lessor of the plaintiff put in a written unstamped agreement to take the premises in question at 2*s.* 6*d.* per annum, to quit at half year's notice. The premises were proved to be actually worth five pounds per annum. It was objected that it ought to have been stamped. But Vaughan B. at Shrewsbury admitted it. And the Court of K. B. held this was right, that it came within the exception in 55 Geo. 3. c. 184., since the subject matter of the agreement being the mere right of occupation, and not the premises themselves, it did not amount to twenty pounds.—*Doe dem. Morgan* v. *Amiss*, MS. Easter Term, 1828.

TRESPASS.

A remainder man, after entering upon a party in possession by intrusion, may maintain trespass against the intruders though he retains possession.—*Butcher* v. *Butcher*, 1 M. & R. 220. S. C. 7 B. & C. 399.

TURNPIKE.

Under the general turnpike act, 3 G. 4. c. 126. s. 86. authorizing the trustees, after the completion of a new road, to stop up the old one, *unless* leading to some church, mill, village, town or place, lands or tenements, to which the new road does not immediately lead; the trustees have a discretionary power of stopping up the old road even in the excepted cases.—*De Beauvoir* v. *Welch*, 1 M. & R. 81. S. C. 7. B. & C. 266.

USURY.

1. An agreement for the payment of the purchase money of an estate by instalments, with interest beyond the legal rate, is not usurious if the sum stipulated for as interest is in fact a part of the purchase money.—*Beete* v. *Bidgood*, 1 M. & R. 143. S. C. 7 B. & C. 453.

2. Where a judge leaves it to the jury to draw their own conclusion on a question of usury, their verdict cannot be disturbed on account of an erroneous opinion upon the matter of fact, expressed by the judge. —*Solarte* v. *Melville*, 1 M. & R. 198. S. C. 7 B. & C. 430.

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# REAL PROPERTY.

## ADVOWSON.

1. Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, the right accruing by the vacancy is a distinct independent chattel, and devolves on the personal representative, who may therefore present for that turn.—*Rennell* v. *Bishop of Lincoln*, 7 B. & C. 113. Dissentient Lord Tenterden, C. J.
2. Where the advowson of a parish is vested in trustees for the benefit of the parishioners, the election of the vicar must be by voting openly, but the right of voting may by long usage be confined to parishioners who pay church and poor's rates. *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93.

## CHARITIES.

1. It has not been decided from what period a corporate body shall be obliged to account in matters of trust. Where a corporation put in their answer in 1811, and in it had rendered accounts which went back as far as 1791, the account of the charity property was decreed from that time.—*Attorney General* v. *the Corporation of Stafford*, 1 Russ. 547.
2. The statute of Elizabeth created no new law on the subject of charitable uses; but only a new and ancillary jurisdiction.—By Lord Redesdale in *Att. Gen.* v. *Mayor, &c. of Dublin*, 1 Bligh, 347.
3. It is not a general rule of equity that a charitable gift for the benefit of the poor is to be confined to such poor as do not receive parish relief.—*Attorney General* v. *Corporation of Exeter*, 2 Russ. 45.
4. The court is strict with the trustees when there is a wilful misapplication; but not when mistake only.—S. C.
5. And it is reluctant to compel the corporation to make a discovery of property applicable to general corporate purposes.—S. C.
6. When trustees of a charity, under an instrument of doubtful construction, have acted honestly, though erroneously, they will not be charged in respect of past misapplication of the funds.—S. C.

## CONDITION.

The doctrine of equity, with respect to conditions precedent in wills, is, that they must be complied with strictly when the property is given over on the devisee's failing to perform them; but the court will interfere, and set up the prior gift when there is no devise over, if the parties can be placed in the same situation, as if the condition had been strictly performed. 1 Russ. 508. Thus when lands were devised in fee, with a direction that the debts due to testator from the devisee's husband should be released, on condition that within two months from the testator's death, the devisee's husband should release all claim to the lands devised, it was held that the husband should

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not lose the benefit intended him, from his not executing the release within the prescribed period.—*Hollinrake* v. *Lister*, ibid. 500.

CONSIDERATION.—See CONVEYANCE.

CONVEYANCE.

1. Though a deed is expressed to be made for natural love, it may be proved to have been made in consideration of marriage, because the real is consistent with the alleged consideration.—*Tanner* v. *Byne*, 1 Simons, 160.
2. A reversion lies in grant, and though the particular estate is only from year to year, and the lands are described as in the grantor's possession, it will pass without attornment, livery, or enrolment.—*Doe dem. Were* v. *Cole*, 7 B. & C. 243. 1 M. & R. 33. 7 B. & C. 243.
3. Recitals in a conveyance, whatever effect they may have against the parties to it, cannot be evidence as against third persons.—1 Russ. 604.

CORPORATION.—See CHARITIES; TRUSTEE.

COVENANT.—And see LANDLORD AND TENANT.

Where a person in remainder in tail under a former settlement, covenanted that in case she should *become entitled to a certain estate under the limitations of a former settlement*, such estate should be conveyed as therein mentioned; and her brother, the antecedent tenant in tail, suffered a recovery, and died without issue, whereby the fee gained by such recovery descended on her; it was held that she took it not under or by virtue of the limitations of the settlement, but by immediate descent from her brother, and was consequently not bound to convey it under the covenant.—*Tayleur* v. *Dickenson*, 1 Russ. 521.

DEED.—And see CONVEYANCE; COVENANT.

Loss of a deed or instrument is a ground on which the court of chancery will exercise jurisdiction, but with great caution.—Per Lord Chancellor *in Barker* v. *Ray*, 2 Russ. 73, 4.

DEVISE IN FREEHOLDS, ESTATE IN FEE OR FOR LIFE.

Words will not carry a fee, only because they would otherwise be mere surplusage; and in their ordinary sense the words '*possessed of*' do not import real estate. Where, therefore, a testatrix, after giving pecuniary legacies, devised to A. B. her two fields at, &c., likewise the remainder of the personalty, and *all she might die possessed of* at the time of her death, after the above bequests were discharged, &c.; the devisee was held to take only an estate for life.[1] *Monk* v. *Mawdsley*, 1 Simons, 286.

[1] The devisor was a feme covert, and the will the execution of a power; but it appears from the reasoning of the court that the case may be stated generally in reference to the above point.—*Vid. ibid.* 289, 290, 291.

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DEVISE—ESTATE TAIL.

1. The word '*leave*' has not, in devises of real estate, the effect of confining the word '*issue*' to issue living at the time of testator's death. When, therefore, the devise was to the use of R. C. for life, and after his decease, to the use of his issue male or female, in such proportion or proportions as he should think proper to devise the same, with power to charge the lands with a jointure, but in case he *should die leaving no issue*, then with remainders over; R. C. was held to take an estate tail.—*Croly* v. *Croly*, 1 Batty, 1.
2. Lands were devised to W. "during the term of his natural life, and in case he has issues, then it is my will they shall jointly inherit the same after my decease." In a subsequent part of the will, testator gave the residue of his *effects real and personal* to the said W.; but *in case he dies without issue*, then, &c. W. died without issue. Held that the words in the first clause, if taken alone, would have given W. an estate for life; and if he had had issues, they would have taken jointly, but that as W. died without issue, the construction turned upon the subsequent devise, and he took an estate tail in the freehold, and the absolute interest in the personalty.—*Ward* v. *Bevil*, 1 Y. & J. 512.

DEVISE—TO TRUSTEES, WHETHER THEY TAKE A CHATTEL INTEREST OR A FEE.

1. If lands are devised to trustees to do something for a given purpose, when that purpose is at an end, the estate ceases. Hence, where lands were devised to a trustee in trust to receive the profits, &c. thereof, for the purpose of maintaining &c. the testator's son till 21, the trustee was held to take only a chattel interest.—*Morrant and wife* v. *Gough and another*, 1 M. & R. 41. S. C. 7 B. & C. 206. [*Note*—that the other circumstances of the case were immaterial to the construction of this devise. See 1 M. & R. 47. 7 B. & C. 211.]
2. If the obligor of a bond *without penalty*, conditioned for the payment of an annuity, devise as aforesaid, then, inasmuch as the bond does not create a debt in law, the devisee in trust is only liable for the profits which accrue during the continuance of his interest as to such arrears of the annuity as grow due after the testator's death. S. C. ibid.

And see CONDITION.

EQUITY.—See LANDLORD AND TENANT.

EXECUTOR.

1. Stock, like all other personal estate, is assets in the hands of the executor, and though specifically bequeathed, it vests in him, and till his assent a specific legatee thereof has no right to the legacy, nor can the bank prevent the executor from transferring the stock.—*Franklin* v. *Bank of England*, 1 Russ. 575. The bank have appealed.

EXECUTORY LIMITATIONS.

Limitations by way of devise, or shifting, or springing use, may be made to depend on *an absolute term* of 21 years after lives in being. By the Vice Chancellor in *Bengough* v. *Edridge*, 1 Simons, 267. Where, therefore, trusts were to be performed after the expiration of a term

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in gross of twenty years, from the decease of the survivor of twenty-eight persons who were living at the testator's decease; they were held valid. S. C. ibid. 173.

FEE-FARM.—See RENT.

HUSBAND AND WIFE.

If a woman executes a settlement in contemplation of marriage, and conceals it from her intended husband, it cannot stand against his marital rights, and the greater or less interval between the date of the instrument and that of the marriage, though a material circumstance, does not alter the principle. Held by the Master of the Rolls in *Goddard* v. *Snow*, 1 Russ. 485. when the interval was 10 months. But note, that in most of the cases, the period has been much shorter.

INSOLVENT DEBTOR.

The insolvent debtor is no party to the ultimate assignment, and the ultimate assignee takes all the estate of the provisional assignee, notwithstanding the insolvent's death in the mean time, and before the hearing of his petition or passing of his examination. *Willis* v. *Elliot*, 1 M. & P. 19.

INSURANCE. See LANDLORD AND TENANT.

LANDLORD AND TENANT.

1. It seems that in equity, as well as at law, a tenant who covenants to pay rent during the whole continuance of his lease, is not in the case of an accident by fire, entitled to a suspension of the rent during such time as is occupied in the rebuilding the premises. By the Vice Chancellor in *Leeds* v. *Cheesham*, 1 Sim. 146.
2. If a landlord, subsequently to the lease, insures the demised premises from accident by fire, and the lease has no exception in respect of them, the tenant cannot compel the landlord to expend the money he receives from the insurance office, in restoring any buildings which may be burnt. Ibid.

MORTGAGE.

1. It is now an unquestioned rule of equity, that an equitable incumbrancer who will take possession, may have a receiver; care being taken that the order for the receiver shall not prevent any who have a better title to the possession, from ousting him if they please. In *Tanfield* v. *Irvine*. 2 Russ. 151. per Lord Chancellor.
2. The rights of an equitable mortgage are not taken away by the mortgagor's not having appeared to the suit, and being out of the jurisdiction of the court. S. C. 149.
3. The court will direct annual rests, as well in an account of occupation rent, as in an account of rents and profits received; and it may direct such rests against a mortgagee in possession, from the time at which the mortgage money was discharged, though there has been no direction to that effect in the prior orders under which those accounts were taken, if it was not then known that the mortgage debt was paid off. *Wilson* v. *Metcalfe*, 1 Russ. 530.

And see TITHES.

OCCUPIER. See TITHES.

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**PEW.** See PRESCRIPTION.

**PREBENDARY.** See ADVOWSON.

PRESCRIPTION.

A pew in the body of a church may be prescribed for as appurtenant to a house out of the parish.—*Lousley* v. *Hayward*, 1 Y. & J. 583. [*Note.*—The court denied the distinction as to this point between the body and an aisle of the church.]

PRESUMPTION.—And see TERM.

Questions of limitation of time, and presumption of surrender, are peculiarly questions for a court of law. By the Lord Chancellor, in *Lopdell* v. *Creagh*, 1 Bligh, 271.

RECEIVER.—See MORTGAGE.

RECITALS.—See CONVEYANCE.

RECOVERY, COMMON.

1. The statute 24 G. 2. c. 48. s. 8., which requires that there shall be four returns inclusive, between the first and second writ of summons to warrant against the vouchers in common recoveries, was merely directory, and such returns may be abridged when the justice of the case demands it. *Still* demandant, *Raymond* tenant, 1 M. & P. 136.
2. The court will not amend a recovery by substituting the name of one county for that of another, though the mistake is sworn to.—*Dolling* demandant, *Rice* tenant, *Euston* vouchee. 1 M. & P. 178.

RENT.

If a fee farm rent is chargeable on the whole of a city, he who is entitled to the rent may demand the whole or any part of it from any one who had a part of or in that city; leaving the person who was thus called upon to pay, to obtain contributions from the other inhabitants as he best could. By Lord Eldon, in *Attorney General* v. *Corporation of Exeter*, 2 Russ. 53.

**RESTS.**—See MORTGAGE.

**REVERSION.**—See CONVEYANCE.

**SETTLEMENT.**—See COVENANT; EXECUTORY LIMITATIONS; HUSBAND AND WIFE; TRUSTEE.

**SHIFTING AND SPRINGING USE.**—See EXECUTORY LIMITATIONS.

**SHIP.**—See MORTGAGE.

**STATUTE.**—See CHARITIES.

**TENANT.**—See LANDLORD and TENANT.

TERM.

A mortgage term was recited in a deed dated 1758, to have been created several years before, and to have been then assigned in trust to attend the inheritance; but there had been a clear possession for 60 years without reference to the term, and neither the deed creating it, nor the assignment of it was produced. The court held, that after the expiration of 70 years without payment of interest, it should, on the authority of Doe v. Hilder, 1 B & A. 782. presume the term to be surrendered.—*Townsend* v. *Champernoun*, 1 Y. & J. 538.

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TITHES.

1. Neither mortgagees, nor persons entitled to tithes, under terms for raising portions or charges, have a right to call for past rents and profits. Hence, the enjoyment of the tithes by the person who is tenant in fee, or tenant for life, subject to such charges, gives him a sufficient title to sustain a suit against occupiers on account of tithes.—*Cherry* v. *Legh*, 1 Bligh, 306.
2. If the occupier shows a colour of title to the tithes not rendered, a court of equity will not interfere, but leave the plaintiff to his legal remedy. Ibid.

TRUST.—See EXECUTORY LIMITATIONS; TERM.

TRUSTEE.

1. Where a devisee in trust for sale (such trust working a conversion) did not execute a conveyance made sixty years back, and purporting to be made by him and the parties beneficially interested; and possession had, since that period, gone under that conveyance, the title was held unobjectionable.—*Townsend* v. *Champernoun*, 1 Y. & J. 538.
2. Where trustee lent money to a postnuptial settlor, which was secured by a subsequent mortgage; but the money was, in fact, never paid to the trustees on the trusts of the settlements; they were, nevertheless, held to be constituted specialty creditors by the mortgage.—*Turner* v. *Byne*, 1 Simons, 160.
3. When trustees are directed to keep down the interest, and out of trust funds to pay off the principal, of incumbrances, the *cestuique* trusts under the deed may complain in a court of equity, that the funds, being available for, were not applied to that purpose, and that the interest of them is therefore unnecessarily continued.—Per Lord Redesdale, 1 Bligh, 339.
4. Where a corporation is in possession of funds arising from rates granted to them by act of parliament, and to be appropriated to certain beneficial purposes, they are, it seems, trustees; but at all events, they are accountable persons, and the circumstance of the act having provided that they shall furnish parliament with an annual account of the sums which they receive, does not oust the jurisdiction of the court of chancery, which, in such a case, can only be taken away expressly, or by necessary implication.—[S. C.] *Attorney-General* v. *Mayor, &c. of Dublin*, 1 Bligh, 312.

VENDOR AND PURCHASER.

1. When an estate subject to, is sold free from, incumbrances, they are matter of conveyance only, though their amount exceeds the purchase money.—*Townsend* v. *Campernoun*, 1 Y. & J. 449.
2. A purchaser, it seems, is not bound to rely on the recitals in deeds, though more than thirty years old, as evidence of a pedigree, which is unsupported by other proof, or by possession accordingly.—*Fort* v. *Clarke*, 1 Russ. 601.
3. If a personal representative, in whom, as such, a leasehold has vested, sells it, not in his proper character, or in the course of administering the assets, and the purchaser is aware of the nature of the

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transaction, it is assets unadministered, and the administrator *de bonis non* of the original testator is entitled to have the sale set aside. —*Cubbidge* v. *Boatwright*, 1 Russ. 549.

VOUCHER.—See RECOVERY.

USE.—See EXECUTORY LIMITATIONS.

WARREN.

The right of warren ought not to be extended by inference to animals not clearly within it. Hence it was held that grouse are not birds of warren.—*Duke of Devonshire* v. *Lodge*, 7 B. & C. 36.

WILL.—See DEVISE.

WILL, REVOCATION OF.

An instrument void as a conveyance, does not revoke a prior will. Where therefore a wife having a power of appointment by *will*, duly executed that power, and afterwards joined with her husband in a deed, purporting to be an appointment of the same lands, but which was a nullity as to the wife, it was held that the will made in pursuance of the power, was not revoked.—*Eilbeck* v. *Wood*, 1 Russ. 564.

WORDS.—See DEVISE.

WRIT.—See RECOVERY.

## EQUITY.

ADEMPTION.

A testator bequeaths his interest in two policies of insurance on the life of his wife to his executors, upon trust, after his wife's decease, out of the amount to be received upon them, to provide for certain legacies. His wife having died, he received the money, and invested it in securities of which he died possessed; held that the legacies failed. —*Barker* v. *Rayner*, 2 Russ. 122.

ANNUITY.

Assignment of 150*l.* part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.* is a grant of an annuity, and must be memorialized.—*Charretie* v. *Vause*, 1 Sim. 153.

APPEAL.

1. An appeal from the Master of the Rolls or Vice Chancellor to the Lord Chancellor is only a re-hearing; evidence may therefore be read which was not read at the original hearing.—*Williams* v. *Goodchild*, 2 Russ. 91.
2. The taking of an account will not be stayed pending an appeal; nor does the court generally direct security to be given for the result of an account.—*Nerot* v. *Burnand*, 2 Russ. 56.
3. Pending an appeal, the court will sometimes stay the sale of property which the decree has directed to be sold; the appellant giving security for its value.—*Ibid.*

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ARBITRATION.

Before the award, either party may revoke the authority of the arbitrator, although the reference is made under an order of the court; but it is a contempt to do so.—*Haggett* v. *Welsh*, 1 Sim. 134.

CERTIORARI.

It is sufficient for granting a writ of certiorari, to remove proceedings in replevin from a court of great sessions in Wales, that the title to the freehold is in question.—*Edwards* v. *Bowen*, 2 Russ. 163.

CHARITY.

1. It is not a general rule that the court will confine a charitable gift for the benefit of the poor, to such poor as do not receive parish relief.—*Attorney General* v. *Corporation of Exeter*, 2 Russ. 45.
2. Where trustees of a charity, under an instrument of doubtful construction, have acted honestly, though mistakenly, the court will not compel them to account for what passed before the filing of an information.—*Ibid.*

COSTS.

1. Costs as between solicitor and client, allowed to the Archbishop and Bishop, when made parties to a suit respecting the validity of the election of a Vicar.—*Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93.
2. The court will not make an order to stay proceedings, until security be given for costs, upon the ground of the plaintiff being about to leave the country.—*Willis* v. *Garbutt*, 1 Y. & J. 511.

EXCEPTIONS.

Where exceptions are taken to the answers to the original, and also the amended bill, a separate rule for arguing each set of exceptions must be given.—*Eastwood* v. *Dobree*, 1 Y. & J. 508.

FEME COVERTE.

Where, after marriage, the husband of a woman entitled to a fund in a cause, agreed, in writing, to settle half his wife's property upon her: held, that the agreement enured to the benefit of the children, and that, therefore, the wife could not wave it.—*Fenner* v. *Taylor*, 1 Sim. 169.

INJUNCTION.

Injunction granted *ex parte* to restrain the owner of a house from making any erections or improvments, so as to obstruct the ancient lights of an adjoining house.—*Back* v. *Stacy*, 2 Russ. 121.

ISSUES.

1. New trial of an issue not granted merely because evidence was rejected which ought to have been received.—*Barker* v. *Ray*, 2 Russ. 63.
2. Nor because the judge represented the effect of the defendant's answer to the jury inaccurately.—*Ibid.*

JURISDICTION.

The court has jurisdiction to control the legal rights of a father over his children on the ground of his immoral conduct.—*Wellesley* v. *Duke of Beaufort*, 2 Russ. 1.



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LANDLORD AND TENANT.

A tenant has no equity to compel his landlord to expend money received from a fire insurance office in rebuilding the demised premises; or to restrain him from suing for rent until the premises are rebuilt.—*Leeds* v. *Cheetham*, 1 Sim. 146.

MOTION.

Where a party shows upon affidavit, that a cause, which he did not know to be in the paper, was disposed of in his absence, the court will restore it to be heard *upon motion*.—*Rowley* v. *Carter*, 1 Y. & J. 511.

PARTNERSHIP.

Where a partner has a right to appoint a person to succeed, upon his death, to his share of the business; the refusal of his appointee to come in on the same terms on which he was a partner, dissolves the partnership: but the dissolution is not wrought by the exclusion of the appointee.—*Kershaw* v. *Mathews*, 2 Russ. 62.

PLEADING.

On an action to recover the produce of foreign specie remitted to an agent, the agent filed his bill, alleging generally, that there were mutual dealings between the parties, and praying an account and injunction: demurrer allowed.—*Frietas* v. *Dos Santos*, 1 Y. & J. 575.

PRACTICE.

1. After an appeal was lodged in the house of lords, the court below made an order, expunging from the registrar's notes, a part of the evidence read upon the hearing: order reversed as irregular.—*Lopdell* v. *Creagh*, 1 Bligh, 255.
2. Answer taken off the file, because, (*inter alia*) in the *jurat*, as to one defendant, a mistake had been made in the year (1817 being written for 1827); and the answer had been affirmed by another defendant, a quaker, under a commission to take his answer upon oath.—*Parke* v. *Christy*, 1 Y. & J. 533.

2. On a bill by underwriters for a commission to examine witnesses abroad; the court held an affidavit of the plaintiffs' solicitor, stating generally, that he believed the plaintiffs had witnesses abroad whose testimony was material, without stating the grounds of his belief, to be sufficient.—*Robinson* v. *Somes*, 1 Y. & J. 578.
3. Where exceptions were taken to a return by the commissioners under a decree of partition, the court held that exceptions would not lie; and that a motion to suppress the return was the proper course. —*Jones* v. *Totty*, 1 Sim. 136.

3. The vendor, under a decree, may confirm an order *nisi* obtained by the purchaser, if the latter neglect to do so.—*Chillingworth* v. *Chillingworth*, 1 Sim. 291.
4. Office copies of depositions in a tithe suit in the exchequer may be read in a similar suit in the court of chancery against another defendant making the same defence, on producing office copies of the bill and answer in the former suit, without an order for that purpose.—*Williams* v. *Broadhead*, 1 Sim. 151.

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RECEIVER.

Where the grantor of an annuity, secured on lands subject to a prior charge, resides abroad, but by his agent continues in the receipt of the profits; the court will, on the application of the annuitant, appoint a receiver, though the grantor has not appeared to the suit.—*Tanfield* v. *Irvine*, 2 Russ. 149.

SPECIALTY CREDITOR.

1. An annuity to the grantor's sister, though expressed to be made for natural love and affection, may be averred to have been in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor.—*Tanner* v. *Byne*, 1 Sim. 160.
2. A husband made a post-nuptial settlement of £4000, and then, in consideration of the £4000 expressed to have been lent to him by the trustees, mortgaged to them a real estate to secure that sum, and covenanted to repay it. Held, that although the husband never paid the money to the trustees, they were, nevertheless, specialty creditors of the husband.—*Tanner* v. *Byne*, 1 Sim. 160.

SOLICITOR.

Where a solicitor retained a sum of money, paid out of court, towards his costs; and upon taxation it appeared that at the time he obtained the money, he had been already overpaid; the court refused upon a motion for that purpose to charge him with interest.—*Wright* v. *Southwood*, 1 Y. & J. 527.

TIMBER.

Tenant for life without impeachment of waste, except as to timber growing in the park, avenues, demesne lands, and woods, adjoining the capital messuage, there being no woods of that description, cannot cut timber in any woods so adjoining the house as to serve for ornament or shelter to it.—*Newdigate* v. *Newdigate*, 1 Sim. 131.

VICAR.

1. Where an advowson is vested in trustees for the benefit of the parishioners, an election of a vicar by ballot is not valid.—*Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93.
2. In such a case, the right of voting at the election of a vicar may be limited by long usage to parishioners who pay church and poor's rates.—*Ibid.*

## BANKRUPTCY.

AFFIDAVIT.

Mode of proceeding on an irrelevant or scandalous affidavit.—*Ex-parte Chisman*, 2 G. & J. 315.

ALLOWANCE.

1. Bankrupt not entitled to allowance unless a sufficient dividend be paid both upon the joint and separate estate.—*Ex-parte Goodall*, 2 G. & J. 281.



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2. A bankrupt has no right to his allowance, until his certificate has been confirmed by the chancellor.—***Ex-parte Pavey***, 2 G. & J. 358.

ANNUITY.

A covenant by a husband to secure to his wife, if she should survive, an annuity, is a sufficient consideration to support a grant of an annuity from the wife's father.—***Ex-parte Draycott***, 2 G. & J. 283.

ASSIGNEES.

Where a bill has been filed before the bankruptcy of the plaintiff, a supplemental bill may be filed by the assignees without the consent of the creditors.—***Beavan*** v. ***Lewis***, 2 G. & J. 245.

ATTESTATION.

A petition which does not on the face of it appear to be by a solicitor, must be properly attested. ***Ex-parte Cole***, 2 G. & J. 269.

BANKRUPT.

1. A bankrupt cannot, after certificate, petition to supersede because he was not a trader.—***Ex-parte Lewis***, 2 G. & J. 208.
2. A bankrupt who is disputing the commission at law cannot, because nonsuited, be compelled to convey.—***Ex-parte Thomas***, 2 G. & J. 278.
3. Where a bankrupt acquiesces, the chancellor will, upon petition, restrain him from proceeding at law to impeach the validity of the commission.—***Ex-parte Leigh***, 2 G. & J. 392.—Vide Ex-parte Glossop, 2 G. & J. 268.

CERTIFICATE.

1. A certificate signed by creditors before the bankrupt has passed his last examination is invalid.—***Ex-parte Cusse***, 2 G. & J. 327.
2. Where a bankrupt lost £40 on a wager, although he, on the same day, won more than that sum, his certificate was stayed on petition. —***Ex-parte Newman***, 2 G. & J. 329.

COMMISSIONERS.

Commissioners may expunge the debt of the petitioning creditor if improperly proved.—***Ex-parte Neal***, 2 G. & J. 308.

COMMITMENT.

1. Where a bankrupt is committed without a protection, the assignee may lodge a detainer against him, between the time of his applying to be examined and his examination.—***Ex-parte Weight***, 2 G. & J. 202.
2. A warrant stating that various questions had been proposed to the bankrupt, "and amongst others the following &c.," is defective.— ***Lawrence's Case***, 2 G. & J. 209.
3. A warrant referring to documents not set forth, so that the judge has not the same information which the commissioners possessed, is defective.—***Price's Case***, 2 G. & J. 211.
4. The omission of a previous examination does not vitiate a commitment upon a distinct ground.—***Atkinson's Case***, 2 G. & J. 218.

COSTS.

The costs of a petition for his certificate, presented by a bankrupt after the petition day, will not be allowed.—***Ex-parte Birch***, 2 G. & J. 206.

DESCRIPTION.

1. A commission omitting to describe the bankrupt as of the place at

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which he had been chiefly known as a trader is bad.—*Ex-parte Parrey*, 2 G. & J. 225.

2. He must be described as of the place where he actually traded.—*Ex-parte Beadles*, 2 G. & J. 243.

ELECTION.

1. A creditor may prove on a bill for part of the debt, and proceed at law for a bill for the remainder, which he had negociated before the bankrupty, and taken up after the proof.—*Ex-parte Sly*, 2 G. & J. 163.
2. A creditor having proved will be restrained from issuing execution against the property in the hands of the assignees.—*Ex-parte Bérnasconi*, 2 G. & J. 381.
3. A creditor cannot proceed at law upon one of two bills for goods, due and dishonoured before proof on the other, but returned after proof.—*Ex-parte Schlesinger*, 2 G. & J. 392.

EQUITABLE MORTGAGE.

1. An equitable mortgagee is entitled to the rents and profits from the time of presenting his petition for a sale.—*Ex-parte Bignold*, 2 G. & J. 273. But see Ex-parte Alexander, 2 G. & J. 275.

EVIDENCE.

It is not necessary to put in the proceedings as evidence where there is no notice to dispute the commission.—*Beavan* v. *Lewis*, G. & J. 245.

GUARANTEE.

A partner may give a guarantee for his partners in a matter relating to the partnership.—*Ex-parte Nolte*, 2 G. & J. 295.

INTEREST.

A separate creditor is not entitled to interest out of the surplus until the joint-creditors have been paid in full.—*Ex-parte Minchin*, 2 G. & J. 287.

JUDGMENT BY NIL DICIT.

Bill does not lie to set aside a judgment by *nil dicit:* the remedy is by petition.—*Mitchell* v. *Knott*, 2 G. & J. 293.

JURISDICTION.

1. Whether the chancellor has jurisdiction to enforce payment from the petitioning creditor of a forfeiture for compounding with the bankrupt.—Vide *Ex-parte Dimmock & Ex-parte Marshall*, 2 G. & J. 262—265.
2. The court has no jurisdiction against an execution creditor who has not proved.—*Ex-parte Botcherly*, 2 G. & J. 367.
3. The vice-chancellor cannot, without consent, advance a petition to be heard before the day for hearing fixed by the lord chancellor.—*Ex-parte Charlton*, 2 G. & J. 390.

LIEN.

Where a London banker and a country banker became bankrupt, and the former was in possession of short bills and a mortgage, deposited with him as security against his acceptances, of such of which as were outstanding, the assignees of the country banker did not relieve his estate: held, that the holders of such acceptances were

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entitled to have the proceeds of the bills and mortgage applied, in preference, to the liquidation of their demands.—*Ex-parte Waring*, 2 G. & J. 403.

PARTNERSHIP.

1. Where different firms are engaged in a joint adventure, the creditors, in respect of the adventure, may prove against the joint estates of the minor partnerships.—*Ex-parte Nolte*, 2 G. & J. 295.
2. A solvent partner cannot prove against the separate estate of his co-partners, upon indemnifying the joint estate against partnership debts.—*Ex-parte Moore*, 2 G. & J. 166.
3. He cannot prove until all the joint debts are paid.—*Ex-parte Ellis*, 2 G. & J. 312.

PETITIONING CREDITOR.

1. Where a bankrupt's assets are greater than his debts, and the creditors who have proved consent to the supersedeas, the petitioning creditor may receive his debt in full, without subjecting himself to the penalty for compounding under 6 Geo. IV. c. 16. s. 8.—*Ex-parte Smith*, 2 G. & J. 291.
2. The deposition of the petitioning creditor, at the opening of the commission, does not entitle him to vote in the choice of assignees.—*Ex-parte Rawson*, 2 G. & J. 353.

PRACTICE.

1. A petition in bankruptcy is not vitiated by being entitled "In Chancery."—*Ex-parte Hudson*, 2 G. & J. 228.
2. Where commissioners refuse to find a person a bankrupt, the court will not allow the commission to be resealed, and directed to other commissioners.—*Ex-parte Nicholls*, 2 G. & J. 266.
3. Where a commission fails through the mistake, either in law or fact, of the original petitioning creditor, the costs of a petition to substitute the debt of another creditor upon which the commission may proceed, are to be paid out of the estate: otherwise if in consequence of misconduct or fraud.—*Ex-parte Cousins*, 2 G. & J. 270.
4. Where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions.—*Ex-parte Window*, 2 G. & J. 280.
5. Where the petitioner does not appear, the respondent is entitled to his costs, upon producing the office copy of the petitioner's affidavit of service.—*Ex-parte Garth*, 2 G. & J. 392.
6. The husband must join in a docket by a *feme coverte* upon a debt due to her *en autre droit*.—*Ex-parte Mogg*, 2 G. & J. 397.

PROOF.

1. Where it was agreed, upon a loan to the bankrupt, that six months' notice should be given before repayment was required; the debt is proveable, though no notice be given before the bankruptcy.—*Ex-parte Dowman*, 2 G. & J. 241.
2. A sum covenanted to be paid by the husband when demanded by the trnstees, if demanded before the bankruptcy, is proveable.—*Ex-parte Brenchley*, 2 G. & J. 174.

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3. A seller in France of contraband goods may prove, unless he participate in smuggling them.—*Ex-parte Cavaliere*, 2 G. & J. 227.
4. Proof cannot be made by one person on behalf of several creditors.—*Ex-parte the Bank of England*, 2 G. & J. 363.

SECURITY.

1. A security for a separate demand does not extend to partnership claims.—*Ex-parte Freen and Morrice*, 2 G. & J. 246.
2. The interest of partners, where the estate was purchased out of the joint property, and mortgaged for a joint debt, is a joint security.—*Ex-parte Free*, 2 G. & J. 250.
3. The proprietor of bills improperly applied in reducing the balance between his bankers in the country and their London agents, is entitled to be indemnified from surplus security held by the latter.—*Ex-parte Armitstead*, 2 G. & J. 371.

STATUTE OF LIMITATIONS.

1. After a commission has issued, debts not before barred, are not affected by lapse of time.—*Ex-parte Ross*, 2 G. & J. 330.

SUPERSEDEAS.

1. A bankrupt cannot, after certificate, petition to supersede because he was not a trader.—*Ex-parte Lewis*, 2 G. & J. 208.
2. A commission will not be superseded, even with consent of creditors, until the bankrupt has surrendered.—*Ex-parte Peaker*, 2 G. & J. 337.
3. A joint commission may be superseded as to one of the bankrupts, without prejudice to its validity with regard to the other.—*Ex-parte Bygrave*, 2 G. & J. 391.

TAXATION.

1. The master's taxation of a solicitor's bill under 5 Geo. 2. c. 30. s. 46. is not conclusive until he has signed his certificate.—*Ex-parte Neale*, 2 G. & J. 226.
2. A petition to tax a solicitor's bill, after payment, must set out some objectionable items.—*Ex-parte Beresford*, 2 G. & J. 259.

TRADING.

A devisee for life, who converts the soil into bricks, is not a trader.—*Ex-parte Burgess*, 2 G. & J. 183.

TRUSTEE.

A new trustee may be appointed under 6 Geo. 4. c. 16. s. 79. without reference to the master.—*Exparte Inkersole*, 2 G. & J. 230.

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It was our wish, from the first, to include in the Digest all King's Bench and Common Pleas Reports from the beginning of Michaelmas Term last. On the publication, however, of the last Numbers of Bingham, and Moore and Payne, we were under the necessity of departing from the plan, or of including two Numbers of each of the Common Pleas Reports in the present Number, which, at that time, we were not aware that we could do. Those Numbers, therefore, were omitted, and, with any others that may appear in the interim, will be given in our next.

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# ABSTRACT OF PUBLIC GENERAL STATUTES.

N. B.—We have given the titles of all statutes passed in the present session and in print at the present time; and have fully abstracted those which from the nature and importance of the subject matter require particular notice. *June* 14, 1828.

CAP. 1.—An Act for applying a Sum of Money for the Service of the Year One thousand eight hundred and twenty-eight. [19th February 1828.]

CAP. 2.—An Act for raising the Sum of Twelve Millions by Exchequer Bills, for the Service of the Year One thousand eight hundred and twenty-eight. [19th February 1828.]

CAP. 3.—An Act for the regulating of his Majesty's Royal Marine Forces while on Shore. [21st March 1828.]

**CAP. 4.—An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters. [21st March 1228.]**

**Cap. 5.—An Act for continuing to his Majesty for One Year certain Duties on Personal Estates, Offices, and Pensions in England, for the service of the Year One thousand eight hundred and twenty-eight. [26th March 1828.]**

**CAP. 6.—An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the Time limited for those Purposes respectively until the Twenty-fifth Day of March One thousand eight hundred and twenty-nine. [26th March 1828.]**

**CAP. 7.—An Act to continue for One Year, and from thence to the End of the then next Session of Parliament, so much of certain Acts of the Parliament of Ireland, as relate to the lighting, cleansing, and watching of which no particular Provision is made by any Act of Parliament. [26th March 1828.]**

**CAP. 8.—An Act for fixing, until the Twenty-fifth Day of March One thousand eight hundred and twenty-nine, the Rates of Subsistence to be paid to Innkeepers and others on quartering Soldiers. [3d April 1828.]**

**CAP. 9.—An Act to enable the Justices of the Peace for Westminster to hold their Sessions of the Peace during Term and the Sitting of the Court of King's Bench. [3d April 1828.]**

**The justices of the peace for the city and liberties of Westminster, may hold their sessions during term and the sitting of the court of**

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king's bench; the sessions to commence in the week preceding the holding of each of the quarter or general sessions of the peace for the county of Middlesex.

CAP. 10.—An Act for applying certain Sums of Money to the service of the Year One thousand eight hundred and twenty-eight. [3d April 1828.]

CAP. 11.—An Act to exempt Vessels propelled by Steam from the Penalties to which Vessels are liable, under various Acts, for having fire on board in the Ports, Harbours, Rivers, Canals, and Lakes of Ireland. [3d April 1828.]

CAP. 12.—An Act to indemnify Witnesses who may give Evidence, before the Lords Spiritual and Temporal, on a Bill to exclude the Borough of Penryn from sending Members to serve in Parliament. [18th April 1828.]

CAP. 13.—An Act for further regulating the Payment of the Duties under the Management of the Commissioners of Stamps on Insurances from Loss or Damage by Fire. [9th May 1828.]

Enacts that detached buildings, or goods contained in such buildings, occasioning a plurality of risks, shall be valued and insured separately, and that any policy, whereby any insurance from fire shall be made upon two or more separate subjects or parcels of risk collectively in one sum, shall be void, and the person granting or continuing it be liable to a penalty of 100l.

CAP. 14.—An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements. [9th May 1828.]

*Note.*—This act extends only to *England* and *Ireland*, and takes effect from 1st January 1829; see ss. 9, 10.

After reciting the Statutes of Limitations 21st Jac. 1. c. 16. and 10 Car. 1. sess. 2. c. 6. (Irish act.) And also that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said statutes, and that it was expedient to prevent such questions; enacts, that in actions of debt or upon the case grounded on any simple contract, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. Joint contractors, or executors or administrators of any contractor, shall not be chargeable in respect of any written acknowledgment of his co-contractor, &c. but this enactment is not to alter, take away, or lessen the effect of any payment of principal or interest made, by any person whatsoever. In actions against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, judgment may be given

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and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff. s. 1.

*Pleas in abatement.*—If a defendant in any action on simple contract shall plead in abatement that any other person ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited acts or this act be maintained against such other person, the issue joined on such plea shall be found against the party pleading the same. s. 2.

*Indorsements of payment.*—No indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statutes. s. 3.

*Set off.*—The said acts and this act shall apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise. s. 4.

*Contracts by Infants.*—No action shall be maintained upon any promise or ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. s. 5.

*Representations of character.*—No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith. s. 6.

*Executory contracts for the sale of goods.*—Reciting that the 29 Car. 2. c.3. and the Irish Act, 7 W. 3. c. 12. did not extend to certain executory contracts for the sale of goods, enacts that the said acts shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. s. 7.

*Stamps on Agreements.*—The memorandums or agreements required by this act are exempted from stamp duty. s. 8.

Cap. 15.—An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in support thereof. [9th May 1828.]

Enacts that it shall be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, Berwick-upon-Tweed and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any

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matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls and other records of the court from which such record issued, shall be amended accordingly.

CAP. 16.—An Act to repeal so much of several Acts as empowers the Commissioners for the Reduction of the National Debt to grant Life Annuities. [9th May 1828.]

CAP. 17.—An Act for repealing so much of several Acts as imposes the cessity of receiving the Sacrament of the Lord's Supper as a Qualification for certain Offices and Employments. [9th May 1828.]

So much of 13 Car. 2. st. 2. c. 1., 25 Car. 2. c. 2. and 16 Geo. 2. c 30. as imposes the necessity of taking the sacrament for the purposes in the said acts mentioned, is repealed. s. 1.

Every person who shall hereafter be elected into the office of mayor, alderman, recorder, bailiff, town clerk, common councilman, or in or to any office of magistracy, or place, trust or employment relating to the government of any city, corporation, borough, cinque port within England and Wales, or the town of Berwick upon Tweed, shall within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:

I A. B. do solemnly and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office of ——— to injure or weaken the Protestant church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be by law entitled. s. 2.

This declaration shall be made before such persons as by the charters or usages of the corporation ought to administer the oath for the due execution of the said offices, or, in default of such, in the presence of two justices. s. 3.

In case the party shall neglect to make the declaration, the election shall be void. s. 4.

Every person who shall be admitted into any office or employment, or who shall accept from His Majesty any patent, grant, or commission, or by the receipt of any salary, &c. would before the passing of this act have been required to take the sacrament, shall within six calendar months after his admission to office, or acceptance of patent, &c. make and subscribe the said declaration, or his appointment shall be void. s. 5.

The declaration shall be made by the last mentioned persons in the court of chancery, king's bench, or at the quarter sessions where the person required to make the same shall reside. s. 6.

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*Exemptions.*]—Naval officers below the rank of rear admiral, military officers below the rank of major general in the army or colonel in the militia, commissioners of customs, excise, stamps, or taxes, or any persons holding offices subject to the said commissioners, or any of the officers concerned in the collection, management or receipt of the revenues subject to the authority of the postmaster general. Persons appointed during their absence from England, or within three months after appointment, may make the declaration within six months after their return. s. 7.

All persons in the actual possession of any office, command, place, trust, service, or employment, or in the receipt of any pay, salary, fee, or wages in respect of or as a qualification for which they ought to have taken or ought to receive the sacrament, are confirmed in such possession, and indemnified from penalties, and the election, &c. of such persons shall be valid. s. 8.

The omission of persons to make the said declaration shall not affect others not privy thereto. s. 9.

CAP. 18.—An Act to repeal the Stamp Duties on Cards and Dice made in the United Kingdom, and to grant other Duties in lieu thereof; and to amend and consolidate the Acts relating to such Cards and Dice, and the Exportation thereof. [9th May 1828.]

All former acts, except as to arrears of duty, and as to bonds entered into in pursuance of former acts, the conditions of which have not been performed, are repealed in s. 1. Every maker of playing cards or dice shall pay annually for a licence five shillings; for every pack of playing cards one shilling; and for every pair of dice twenty shillings. s. 2. The duty shall be denoted on the ace of spades. s. 4. The makers omitting to take out an annual licence are subject to a penalty of 100*l.* and forfeiture of all materials. s. 5.

*Note.*—The other sections of this act relate to the collection and payment of the duties, and to regulations as to exportation.

CAP. 19.—An Act for applying a Sum of Money out of the Consolidated Fund for the Service of the Year One thousand eight hundred and twenty-eight. [9th May 1828.]

CAP. 20.—An Act for prohibiting, during the present Session of Parliament, the Importation of Foreign Wheat into the Isle of Man; and for levying a Duty on Meal or Flour made of Foreign Wheat imported from the Isle of Man into the United Kingdom. [13th May 1828.]

CAP. 21.—An Act to regulate the Carriage of Passengers in Merchants' Vessels from the United Kingdom to the Continent and Islands of North America. [23d May 1828.]

CAP. 22.—An act to consolidate and amend the Laws relating to the Trial of controverted Elections or Returns of Members to serve in Parliament. [23d May 1828.]

The acts repealed are 10 Geo. 3. c. 16. 11 Geo. 3. c. 42. 14 Geo. 3 c. 15. Part of 25 Geo. 3. c. 84. Part of 28 Geo. 3. c. 52. 32 Geo. 3.

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c. 1. 34 Geo. 3. c. 83. 36 Geo. 3. c. 59. 42 Geo. 3. c. 84. 47 Geo. 3. c. 1. Part of 47 Geo. 3. c. 14. 53 Geo. 3. c. 71. See sec. 1.

Upon a petition being presented complaining of an undue election or return, a time shall be fixed for taking the same into consideration, and notice thereof given by the speaker to the sitting members and to the petitioners. s. 2. If petitioners do not attend at the time appointed, the order for taking the petition into consideration shall be discharged, and such petition shall not be any further proceeded upon. s. 3. No petition to be proceeded upon unless petition shall be subscribed by a person having a right to vote, or by a person who had been a candidate. s. 4. The petitioners shall within fourteen days after presentment of petition, enter into a recognizance in the sum of 1000*l.*, with two sureties in the sum of 500*l.* each, or four sureties in the sum of 250*l.* each for the payment of costs. s. 5. The names and additions of sureties shall be delivered to the clerk of the house of commons on the day the petition is presented, or the day after at furthest. s. 6. The sureties shall enter into recognizances before the speaker. s. 7. The parties or sureties living more than forty miles from London may enter in recognizances before a justice. s. 8. Petitions shall not be withdrawn unless the member returned shall have vacated his seat, or some matter shall have arisen since the presentment of petition. s. 9. A voter, upon petition, may become a party to oppose or defend the return. s. 10. Where the seat becomes vacant, or the sitting member declines to defend his return before the petition is taken into consideration, notice shall be sent by the speaker to the returning officer of the place to which the petition relates, who shall affix a copy of such notice on the county hall, town hall, or parish church, nearest to the place of election; notice shall also be given in the London Gazette, and the consideration of such petition shall be adjourned, so that thirty days may intervene between the day on which such notice shall be inserted in the Gazette and the day on which the petition shall be taken into consideration. s. 11. Within thirty days after such notice persons claiming a right to vote may be admitted as parties to defend the return. s. 12. Members who shall have given notice of their intention not to defend their return, shall not be admitted as parties in subsequent proceedings, and such members shall be restrained from sitting or voting on any question until such petition shall be decided upon. s. 13. Lists of votes intended to be objected to, shall be delivered to the clerk of the house of commons, which list shall be open to the inspection of the parties. s. 14. The evidence as to the validity of votes shall be confined to the objections particularized in the lists. s. 15. Committees are empowered to send for and examine persons, papers and records. s. 39. Witnesses misbehaving themselves may be commited to the custody of the serjeant at arms. Id. When the merits of a petition depend on questions respecting the right of election, &c. the committee are to require statements in writing of such rights and to report thereon. s. 50. Petitions of appeal against the judgment of the committee to be presented to the house within six months after a report has been made on any right of election, otherwise the judgment of such committee to be deemed final.

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s. 51. Notice of the time of taking petitions of appeal into consideration shall be inserted in the London Gazette and sent to the returning officers, who are to affix such notice on the county hall, &c., and any person may, at any time before the day appointed for taking such petition of appeal into consideration, be admitted to defend the right of election, &c. ss. 52. 53. When the petition shall be deemed frivolous and vexatious, the costs shall recovered by the parties who opposed such petition from the person or persons or any of them who signed such petition. s. 57. When the opposition to such petition shall be deemed frivolous or vexatious the costs may be recovered from the parties or any of them who opposed such petition. s. 58. Where the petition is not opposed, the costs shall be paid by the sitting members, or by such persons as the house shall have admitted or directed to oppose such petition. s. 59. Application for payment of costs must be made to the speaker within three months after the determination of the merits of the petition; the bills of costs to be taxed by proper officers, to be appointed by the speaker, as between attorney and client. ss. 60, 61. The costs, after demand made, may be recovered by action of debt, and the speaker's certificate of the amount shall have the force and effect of a warrant to confess judgment. s. 63. Persons paying costs may recover a portion thereof from other persons liable thereto. s. 64. If petitioners shall neglect to pay the costs to witnesses within seven days after demand made, or shall refuse to pay the other costs within six months, the recognizances shall be estreated. s. 65. If the returning officer shall wilfully neglect or refuse to return the person duly elected, he shall be liable to an action at the suit of such person, who shall recover double damages and full costs of suit. s. 56. The act to take effect from the last day of the present session. s. 57.

*Note.*—The other sections relate to the appointment of, and proceedings before committees.

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## IMPORTANT BILLS PROPOSED DURING THE LAST SESSION.

A bill to repeal so much of any acts relating to the relief or settlement of the poor as confer settlements by hiring or service.

A bill to declare and amend the law relating to the employment and payment of able bodied labourers, from the poor rates, and for the better rating tenements under a certain annual value.

A bill to authorise barristers at law to act as solicitors in any court or jurisdiction in revenue matters.

A bill to amend the last bankrupt act, enacting (amonst other things) "That so much of the said statute as provides that no creditor who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors be hereby repealed.

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A bill for remedying a defect in the titles to lands purchased for charitable purposes.

A bill for consolidating and amending the laws for facilitating the payment of debts out of real estate.

This bill passed the house of commons on the 10th of June instant. It repeals 3 & 4 W. & M., 4 Ann., and 47 G. 3. for the purpose of consolidating them and enlarging their operation, and makes a devise by a person seised in fee or having a power of appointment absolutely void against creditors by bonds, covenants, or other specialties, and gives them an action against the heir and devisee jointly; if no heir, then against the devisee solely, and makes the latter liable in either case for a false plea.

Law of evidence bill.

Tithe commutation bill.

Customary tenure bill.

Bill to afford to criminals, accused of petty felonies, the option of summary conviction by two or more magistrates.

Bill to amend the ecclesiastical jurisdiction exercised in country courts.

Bill to enable persons charged with felonies to make their full defence by counsel, under certain regulations.

Bill to alter and amend act 47 G. 3. c. 74. to facilitate the payment of the debts of traders.

Bill for settling the rights of executors in undisposed of residues of personal estates.

This bill passed the house of commons on the 13th of June instant. In the copy, as amended by the committee, and ordered to be printed on the 21st of May last, the enactment stands thus: — "That when any person shall die after the 30th day of September, 1828, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors, shall *not* be deemed, by courts of equity, to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the statute of distributions in respect of any residue not expressly disposed, unless it shall appear by the will, or any codicil thereto, that the person or persons so appointed executor or executors was or were intended to take such residue beneficially" — an enactment which strikes us to be precisely the reverse of what the house intended.

A bill to alter several acts relating to contracts for the loan of money at interest.

A bill for amending the laws relating to property belonging to idiots, lunatics, and persons of unsound mind.

Bill to explain and amend the law relating to real property belonging to British subjects, and others, within the jurisdiction of his Majesty's

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courts in India, and the liability of such property as assets (in the hands of executors and administrators), to the payment of the debts of deceased persons.

Bill for the better regulation of divisions in the several counties of England and Wales.

Bill to amend the laws in force relating to the stamp duties on sea insurances, on articles of clerkship, on certificates of writers to the signet, and of conveyancers and others, on licence to dealers in gold and silver plate, and pawnbroker's, on drafts on bankers, and on licences for stage coaches in Great Britain, and on receipts in Ireland.

This bill enacts, that articles of clerkship executed prior to 22d June 1825, may be stamped before the last day of Hilary Term, 1829, on paying the penalty of 5*l.*, and also that all certificates now or hereafter to be granted to conveyancers, special pleaders, and draftsmen shall determine on the 31st October, 1828; and that each certificate henceforth shall date from, and always terminate on that day. Thus a practitioner whose certificate expires a fortnight before the appointed day, must pay 12*l.* for liberty to practice during the intervening time, or run the risk of an information; and those who have recently taken out their licences will be defrauded of more than half the time for which the privilege they have paid for should extend. The price of a certificate being 12*l.*, or one pound a month; a scale of allowance should certainly be framed, to avoid so palpable an extortion.

A Bill to authorise the sale of game, and to alter the qualification for taking and killing game in England.

Small Debts bill, for the more easy recovery of small debts in the county courts of England and Wales and for extending the jurisdiction thereof.

The Solicitor-General has given notice of a bill to enable his Majesty's courts of law at Westminster, to sit out of Term, for the purpose of trying causes at bar. Sir James Scarlett has presented a petition for an inquiry into the state and situation of the judges' chambers, and the several public common law offices. There are also bills depending for the amendment of the criminal law in Ireland and India.

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# LAW COMMISSIONS.

## *Copy of Commission of Enquiry into the Law of England, respecting Real Property.*

GEORGE the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith: to our trusty and well beloved John Campbell, Esq., one of our counsel learned in the law, William Henry Tinney, Esq., John Hodgson, Esq., Samuel Duckworth, Esq., and Peter Bellinger Brodie, Esq., barristers at law, greeting: Whereas we have thought it expedient, for divers good causes and considerations us thereunto moving, that a diligent and full enquiry should forthwith be made into the law of England, respecting real property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto, for the purpose of ascertaining and making known to us, whether any and what improvements can be made therein; know ye, that we reposing great trust and confidence in your zeal, industry, discretion and integrity, have authorized and appointed, and do by these presents authorize and appoint you, the said John Campbell, William Henry Tinney, John Hodgson, Samuel Duckworth and Peter Bellinger Brodie, or any three or more of you, to make a diligent and full enquiry into the law of England, respecting real property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto, and that you enquire whether any and what improvements can be made therein, and how the same may be best carried into effect: and for the better discovery of the truth in the premises, we do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such and so many of the officers, clerks and ministers of our courts of law and equity, and other persons, as you shall judge necessary, by whom you may be the better informed of the truth in the premises, and to enquire of the premises and every part thereof, by all other lawful ways and means whatsoever: and we do hereby give and grant unto you, or any three or more of you, full power and authority when the same shall appear to be requisite, to administer an oath or oaths to any person or persons whatsoever, to be examined before you, or any three or more of you, touching or concerning the premises; and we do also give and grant to you, or any three or more of you, full power and authority to cause all and singular the officers, clerks and ministers of our said courts of law or equity, to bring and produce upon oath before you, or any three or more of you, all and singular rolls, records, orders, books, papers or other writings belonging to our said courts, or to any of the officers within the same as such officers: and our further will and pleasure is, that you do within two years after the date of this our commission, or as soon as the same can conveniently be done, (using all diligence), certify to us in our court of chancery, on parchment, under your hands and seals, or under the hands and seals of any three or more of you, whether any and what improvements can be made in the law of England, respecting real property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto, and how such improvements (if any) may be best carried



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into effect; and we further will and command, and by these presents ordain, that this our commission shall continue in full force and virtue, and that you our said commissioners, or any three or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment: and we do hereby direct and appoint, that you, or any three or more of you, may have liberty to certify your several proceedings from time to time to us in our said court of chancery, as the same shall be respectively completed and perfected: and we hereby command all and singular our justices of the peace, sheriffs, mayors, bailiffs, constables, officers, ministers, and all other our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents: and for your assistance in the due execution of this our commission, we have made choice of our trusty and well beloved Charles James Swan, Esq., to be secretary to this our commission, and to attend you; whose service and assistance we require you to use from time to time as occasion shall require: In witness whereof, we have caused these our letters to be made patent. Witness Ourself, at Westminster, the sixth day of June, in the ninth year of our reign.

By Writ of Privy Seal,

Crown Office in Chancery. BATHURST.

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## *Copy of Commission of Enquiry into the course of Proceedings in Actions, &c. in the superior Courts of Common Law in England and Wales.*

George the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith: To our trusty and well-beloved John Bernard Bosanquet, Esq. one of our serjeants at law; Henry John Stephen, Esq. serjeant at law, Edward Hall Alderson, Esq., James Parke, Esq., and John Patteson, Esq. barristers at law, greeting: Whereas we have thought it expedient, for divers good causes and considerations us thereunto moving, That a diligent and full enquiry should forthwith be made into the course of proceeding in actions and other civil remedies established or used in the superior courts of common law in England and Wales, from the first process and commencement, to the termination thereof, and into the process, practice, pleading, and other matters connected therewith: And that enquiry should be made, whether any and what parts thereof may be conveniently and beneficially discontinued, altered or improved, and how the same may be best carried into effect; and whether or in what manner the dispatch of the general business in the said courts may be expedited: Know ye, that we, reposing great trust and confidence in your zeal, industry, discretion and integrity, have authorized and appointed, and do by these presents authorize and appoint you, the said John Bernard Bosanquet, Henry John Stephen, Edward Hall Alderson, James Parke and John Patteson, or any three or more of you, to make a diligent and full enquiry into the course of proceeding in actions, and other civil remedies established or used in our superior courts of common law, from the first process and commencement, to the termination thereof, and into the process, practice, pleading, and other matters connected therewith, and to enquire whether any and what parts thereof may be conveniently and beneficially discontinued, altered or improved; and what (if any) alterations amendments or improvements may be beneficially made therein, and how

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the same may be best carried into effect; and whether and in what manner the dispatch of the general business in our said courts may be expedited: And for the better discovery of the truth in the premises, we do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such and so many of the officers, clerks and ministers of our said courts, and other persons as you shall judge necessary, by whom you may be the better informed of the truth in the premises, and to enquire of the premises, and every part thereof, by all other lawful ways and means whatsoever: And we do hereby give and grant unto you, or any three or more of you, full power and authority, when the same shall appear to be requisite, to administer an oath or oaths to any person or persons whatsoever, to be examined before you, or any three or more of you, touching or concerning the premises; And we do also give and grant to you, or any three or more of you, full power and authority to cause all and singular the officers, clerks and ministers of our said courts, to bring and produce upon oath before you, or any three or more of you, all and singular rolls, records, orders, books, papers, or other writings, belonging to our said courts, or to any of the officers within the same, as such officers: and our further will and pleasure is, that you do within one year after the date of this our commission, or as soon as the same can conveniently be done, (using all diligence) certify to us in our court of chancery, in parchment, under your hands and seals, or under the hands and seals of any three or more of you, whether any and what part or parts of the proceedings in actions and other civil remedies, established or used in our said courts, or of the process, practice, pleading and other matters connected therewith, may be conveniently and beneficially discontinued, altered or improved, and what (if any) alterations amendments or improvements may be beneficially made therein, and how the same may be best carried into effect; and whether and in what manner the dispatch of the general business in our said courts may be expedited: And we further will and command, and by these presents ordain, that this our commission shall continue in full force and virtue; and that you our said commissioners, or any three or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment; and we do hereby direct and appoint, that you, or any three or more of you, may have liberty to certify your several proceedings from time to time to us, in our said court of chancery, as the same shall be respectively completed and perfected; and we hereby command all and singular our justices of the peace, sheriffs, mayors, bailiffs, constables, officers, ministers, and all other our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents: And for your assistance in the execution of this our commission, we have made choice of our trusty and well-beloved George Faulkner, attorney at law, to be secretary to this our commission, and to attend you; whose service and assistance we require you to use from time to time, as occasion shall require: In witness whereof, we have caused these our letters to be made patent. Witness Ourself, at Westminster, the sixteenth day of May, in the ninth year of our reign.

By Writ of Privy Seal.

Crown Office in Chancery. BATHURST.

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## LIST OF GENTLEMEN TO BE CALLED TO THE BAR IN TRINITY TERM, 1828.

### LINCOLN'S INN.

Edwin Guest.
George Robert M. Ward.
Thomas Peake.
Samuel Nouaille.
William Shee.
Richard Gelson Duck.
William Dugmore.
James Eastwood.
Richard Beauvoir Berens.
Thomas Ramshay.
Richard Heathfield.
Thomas Swinburne.
George Dacre Alexander Tyler.

### INNER TEMPLE.

Martin Charles Burney.
John Campbell.
Charles Harwood.
Edward Salmon.
Robert Graves.
William Robert Bigg.

### MIDDLE TEMPLE.

Robert Andrews.
John Lloyd Philipps.
Thomas Williams Helps.
Thomas Clement Sneyd Kynnersley

### GRAY'S INN.

Alfred Septimus Dowling.

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*A List of Persons who have given Notice to be admitted Attorneys of His Majesty's Courts of King's Bench and Common Pleas, at Westminster, in Trinity Term,* 1828.

### IN THE KING'S BENCH

Aldridge, John
Andrew, Henry Prynn
Abbott, Arthur
Adams, Edwin
Abbott, Edward
Atkinson, John
Bull, James
Bennett, Thos. jun.
Baldwin, George
Bellamy, Lewis Robert
Bloxsome, Berkeley W.
Breachcroft, Richard
Brookbank, Charles
Becket, John
Bullock, William
Bowen, Robert
Brewster, Robert
Bennett, John Nevitt
Brien, Michael
Bird, James
Baker, John, jun.
Bayly, John Bethune
Barry, Edward
Beckett, Edward
Barrow, Thos. William
Byles, James Jeremiah
Bodenham, Charles
Biggenden, John
Bond, John Fletcher
Clarke, John Longworth
Casterton, William
Castleman, Henry
Cattarus, Richard
Cawood, John, jun.
Collins, Henry
Carter, George Barker
Crooke George William
Coleman, Charles
Crosby, James
Coe, Frederick William
Caldwell, Fred. Wm. J.
Chadwick, Henry
Clowes, Edw. Norris, jun.
Clutterbuck, Thomas
Cordeux, William
Dalby, Henry Byard
Elwin Edward
Edgworth, Thomas, jun.

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Eliot, James
Fisher, John, jun.
Fladgate, William Mark
Fane, Gregory
Foulkes, John
Fraser, George
Field, George Ventris
Goodman, George Robert
Greenwood, John
Gem, Harvey
Gibson, William
Good, Henry
Gascoigne, William
Gifford, John Attersoll
Godmond John Collinson
Haggitt, Thomas
Hughes, John
Hayward, Wm. Robertson
Hugall, John West
Hughes, Thomas, jun.
Harper, William
Howlett, Joseph
Hunt, Charles
Hill, Charles Stephen
Hall, George
Hitchcock, Samuel
Hunt, William Clove
Johnston, John
Jones, James
Jackson, James Allen
James, John
Jones, Charles
Knight, Charles James J.
Killmister, G. R., jun.
Kirkpatrick, John
Kingdon, Charles
Kemp, Wm. Coryton
Langley, John
Lamb, John Francis
Link, George
Lockyer, Nicholas
Lucas, George
Leeson, Teavil, jun.
Littlewood, John Wm.
Lidiard, Samuel
Lechmere, William
Lane, Farindon
Mogg, John Rees
Marris, William
Marshall, Joseph Edward
Meek, John
Millett, John Fortescue
Milnes, Henry
Marsden, Geo. Edensor
Matthews, Joseph
Newton, Joseph
Notcutt, Steph. A. jun.
Owen, John Gwynne H.
Orton, Richard
Porter, John Thomas
Parsons, Charles Fred.
Pogson, Edward Henry
Priest, Miles
Pearce, William Henry
Price, Philip
Pugh, Richard
Pringle, Robert
Palmer, Charles James
Pigot, Charles Henry
Rushworth, E. Allenby
Roberts, Wm. Prowling
Royle, William
Russell, J. H. Cromwell
Russell, David, jun.
Rance, Henry
Robinson, Chris. Mort.
Saunders, John
Symonds, Arthur
Spicer, John William
Speakman, Richard
Sheffield, William
Shepherd, Charles
Stewart, Robert, jun.
Summerscales, John
Smith, Montague Edw.
Scott, Richard
Smith, Robert
Sharp, James
Sinclair, Donald
Smith, Edward George
Soame, John Frith
Shepherd, Thomas
Stoker, Robert
Scholfield, John
Snowball, Henry
Smith, Edward, jun.
Smack, Benjamin Barker
Stringer, Samuel
Street, William Jesse
Sumber, Henry
Squance, Barry Parr
Townsend, Arthur
Tyson, Edward
Townsend, J. Honeywood
Tremenheere, John H.
Tatham, William
Turner, Samuel Wylde
Taylor, Thomas
Tindale, Thomas
Towgood, Stephen
Voutt, Frederick
Van Heythuysen, Rd. Ed.
Wilkinson, Thomas
West, John
Weedon, Edward
Wakeling, H. Beverly
Webster, John
Wathen, John Hayward
Wiggins, Thomas
Waters, Thomas
Williamson, William
Woollaston, John
Wilson, Wm. Silvester

## IN THE COURT OF COMMON PLEAS.

Simeon, John, jun.
Unthank, John.

## LIST OF PERSONS TO BE RE-ADMITTED.

Barker, Henry
Bond, Thomas Berkeley
Cocker, George Henry
Collett, Wm. Collyer
Dickins, Edw. Dickens
Dobson, Matthew
Evatt, Henry
Hague, Thomas
James, William
Kelly, Peter
Laver, George
Orchard, James
Pritchard, William
Poynton, Henry
Sanderson, John Thomas
Shutt, Joseph
Stephenson, Robert
Welch, Charles Hewitt

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# EVENTS OF THE QUARTER.

The most important event that has occurred within the period which it is our duty to comprise, is the appointment of the law commissioners. On this, however, it is not necessary to dwell, as the public know full well the characters and attainments of the gentlemen selected by the Ministry. Serjeants Bosanquet and Stephen, Messrs. Parke, Patteson, and Alderson have, perhaps, as intimate an acquaintance with the law of actions as any men whom it was possible to choose, and in the intricacies of pleading are all particularly versed. But with the exception of Mr. Serjeant Stephen (whose work is as admirable for the comprehensiveness of its views as for the clearness and accuracy of its details), we are not aware that the individuals alluded to have ever done, said, or written anything which affords an earnest of legislative ability; much less, a fair reason for supposing that the plan or groundwork of the system will be changed. The theorist has little to anticipate; the formalist slight cause for apprehension. A body so constituted, and we speak it to their praise, will respect the rules that have guided them so long, and touch with care what past ages have bequeathed us; but they will bring to light many causes of delay; they will clear away the nonsense of antiquity; and simplify where simplicity is attainable.

Of course little progress has hitherto been made: they have intimated, however, a readiness to attend to all who have amendments to suggest; and the propriety of doing away with the general issue has been already the subject of discussion. We hear that considerable difficulty has been experienced in settling this amendment, from the fear of imposing too great a burthen of proof on the defendant. It is also said that a proposition has been made to retain the general issue, and require a notice of the particular defence; in analogy, we presume, to particulars of demand.

With respect to the commission, of which Mr. Campbell is the head, and Messrs. Brodie, Hodgson, Duckworth and Tinney the subordinate members, it can hardly hope for that degree of confidence which the other may plausibly demand. Mr. Campbell's fame is principally built upon his knowledge of mercantile and not of conveyancing jurisprudence; and his coadjutors, though all reputed good draughtsmen and sound lawyers, are certainly not the highest of their class. Report says that appointments were refused by many of the ablest men; a fact which may account, in some measure, for the comparative inferiority of the body. It is generally understood that Messrs. Hodgson and Duckworth are rather fond of innovation; Messrs Brodie and Tinney opposed to it; and Mr. Campbell well fitted for a moderator, as far, at least, as opinions are concerned.

The list, given above, of proposed enactments, will show sufficiently how the legislature has been dealing with jurisprudence. The most important of these, is the projected change in the jurisdiction of the county courts; which, it seems, is to be extended immediately to all debts under 10*l.*; the process and pleading to be ex-

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tremely simplified; and the jury to consist of five persons only, qualified like jurymen in the Courts of Westminster. Should the bill operate well, Mr. Peel proposes to extend the jurisdiction to all debts under 20*l*. The particular provisions are not as yet determined on; but Mr. Peel of course must know that the present county courts are the worst of nuisances; that the inferior rate of remuneration has compelled respectable practitioners to abandon them, and that the business is almost wholly conducted by the lowest retainers of the law. The consequence is, that a trifling debt is hardly ever sued for in the hope of recovering a sixpence, but merely for the purposes of revenge; and justice is brought home to the doors of the poor, to make them the victims of oppression. Nor is this entirely attributable to the present limited jurisdiction of the tribunal. The Lancaster county court has cognizance of pleas to the amount of £10, and we understand from credible authority that great inconveniences have uniformly resulted from it.

The only recent professional changes are the retirement of Mr. Marryatt from attendance on the courts, and the appointments of Mr. Horace Twiss, and Mr. Shepherd. The first of these was in extensive practice, and laboured hard to execute it well; but, diligence excepted, we cannot assign him the higher merits of an advocate. He is a good case lawyer, and troubles himself very little about principles; is well acquainted with laws as they are, and neither knows nor cares about their origin. We say this without apology, for it is the boast of the gentleman we are speaking of, that since he left school he has never read any but law books. "I do not wish to be understood," says an acute critic, "that he is upon a level with an Irish barrister, who, referring to two great events, the obtaining Magna Charta, and the Bill of Rights, confounded the sovereigns from whom they were exacted; nor with the celebrated English barrister, who, having occasion to quote a statute, and being required to mention the period at which it passed, very gravely replied, that it was in the reign of one of the Henrys, or one of the Edwards, but he could not exactly tell which: ordinary conversation, and the indorsements upon his Ruff head, supposing he never opened it, would afford sufficient instruction to avoid such exposures. There is no doubt, however, that he is what would be considered in well-educated society—that society for which his rank qualifies him—an ignorant man." As a speaker, Mr. Marryatt does not rise to mediocrity; his language is bad, and his action peculiarly ungraceful; yet now and then he succeeded in a metaphor. "It poured forth," said he on one occasion, (he was speaking of a chimney) "it poured forth whole volumes—volumes did I say?—whole *encyclopedias* of smoke!" In examining a witness he was occasionally effective; rather, however, by perseverance than acuteness. No retort confused or startled him; and he would patiently reiterate a question till all modes of evasion had been tried in vain. In private life he is reputed an amiable and excellent man.

Mr. Horace Twiss has not formally seceded from the profession, yet for a time, at least, he must surrender it, as inconsistent with the duties of his post. Some surprise has been expressed at his appointment, and the public at large are by no means aware of his capacity, though few men have made better speeches. On his first attempt, the common rules of courtesy were departed from, and he was most illiberally received. He had proceeded for about ten minutes when he came to the words, "I have now said enough"—"on this branch of the subject," he meant

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to say, but the sentence was suddenly cut short by a loud "hear," we believe, from Mr. Brougham. The joke was too tempting to be lost, and the cry re-echoed through the house. "I have now said enough," repeated Mr. T. "Hear? hear! hear!" reiterated his auditors; and the result of course was irretrievable confusion. But conscious talent is not easily put down, and the individual in question was well entitled to say, like Sheridan when Woodfall told him he had failed, "I have it in me, and by G— it shall come out." His next appearance was in a debate on the everlasting Catholic question. He rose about half past seven, the least interesting hour in an interesting debate, as many of the members are then regaling at Bellamy's. The duke of Norfolk and several Catholic peers were under the gallery, watching anxiously each turn of the discussion; and a murmur of disappointment was distinctly audible, when a young and briefless barrister, with all the shame of former failure on his head, rose up to second their pretensions. It was for him an awful moment. Sink him now, and he was sunk for ever. But his cause was strong: he was conscious of its strength; and on this most hacknied of all hacknied topics his views were decidedly original. Attention was rivetted, and the house was rapidly refilled. It was a clear unanswerable speech, and he sat down amidst thunders of applause. The late lord Londonderry shook him warmly by the hand, with a "Depend upon it—they'll hear you for the future;" and the duke of Norfolk immediately requested an introduction, and was profuse in thanks and congratulations. An indifferent observer would have said, that from that moment his success was certain; and no one who has read the Morning Chronicle reports of his speeches on Sir F. Burdett's motion for an inquiry into the affair at Manchester, and on Mr. G. Lamb's motion for allowing counsel to felons, would hesitate to say, that his more recent efforts are fully equal to his second. Yet, though the house of commons are conscious of his powers, there has always been a prejudice against him, attributable partly to a vague report of his early politics, and partly from the jealousy invariably entertained by that assembly against any one whom they suspect of entering it as a political adventurer. What right has any man, they naturally enough exclaim,—what right has any man to come amongst us, without birth, or wealth, or high professional celebrity? Though Burkes and Cannings may bear down the cry, less-gifted men must quail before it, till a fortunate emergency occurs. The late change was such to Mr. T., and we feel assured that he will not be wanting to the opportunity.

Of Mr. Shepherd we are not called upon to speak.

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